APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 38

JAMES G. GLOVER, *et al.*,

Petitioners,

—v.—

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

PETITION FOR CERTIORARI FILED MARCH 4, 1968

CERTIORARI GRANTED APRIL 22, 1968

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 24,288

JAMES G. GLOVER, ET. AL.,

Appellants,

versus

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ET. AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

INDEX.

APPENDIX.

RELEVANT DOCKET ENTRIES.

Date	Filings-Proceedings
12/12/66	Docketing Cause, Etc.
12/12/66	Flg. Record on Appeal.
12/12/66	Flg. Appearance for Appellants.
12/12/66	Flg. Letter of Appellant for withdrawal of Record for the Purpose of Printing (E. S. Upton Printing Co.).
12/19/66	Flg. Appearance for Appellees (2).
12/22/66	Flg. Appearance for Appellee.
1/18/67	Flg. 15 Printed copies of the Record.
2/17/67	Flg. Brief of Appellants with c/s (20 printed copies).
3/ 2/67	Flg. Letter Request for extension of time for filing Union Appellee's Brief Granted to 3/31/67 (GFG).
3/ 8/67	Flg. Motion for extension of time for filing Railway Appellee's Brief. Granted to 3/23/67.
3/23/67	Flg. Brief for Appellee, St. Louis-San Francisco Railway Company with c/s (20 printed copies).
3/30/67	Flg. Brief of Appellee, Brotherhood of Railway Carmen of America with c/s (20 printed copies).

5/ 5/67	Flg. Appearance for appellee (Bro. Rlwy. Carmen of Am.).
5/23/67	Flg. Appearance for appellant.
6/ 2/67	Flg. Reply Brief for Appellants with c/s (20 printed copies).
8/ 9/67	Ordered Assigned Thursday, October 19, 1967 at Montgomery.
10/19/67	Flg. Appearance for Appellee.
10/19/67	Entg. Argument & Submission before Js. Rives, Goldberg & Dyer.
12/ 5/67	Affirmed "Per Curiam" (RTR).
12/27/67	Judgment as Mandate issued to Clerk, Birmingham, Ala.
12/27/67	Record on appeal returned to Clerk, Birmingham, Ala.
2/21/68	Preparing and Certifying Proceedings on Certiorari.
3/ 7/68	Flg. Notice (P. C.) of Clerk of S. C. of filing for certiorari.
4/26/68	Flg. Order of S. C. granting the petition for cetriorari.

COMPLAINT.

Filed Jul. 13, 1965.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION.

Civil Case No. CA 65-477.

JAMES G. GLOVER, JAMES C. DENT, WILLIAM H. GREENE, JR., PAUL CAIN, ODELL BARMORE, CAREY GOODEN, MATTHEW C. PAYNE, JOHN E. JEFFRIES, ALBERT L. BOYD, BUSTER WRIGHT, VINCENT P. PIAZZA, JIMMIE O. WILEY, HOWARD D. KEPLINGER, JR., and SAM J. GUGLIOTTA,

Plaintiffs,

versus

ST. LOUIS-SAN FRANCISCO RAILROAD COMPANY, a Corporation, and BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, an unincorporated association,

Defendants.

Come now James G. Glover, James C. Dent, William H. Greene, Jr., Paul Cain, Odell Barmore, Carey Gooden, Matthew C. Payne, John E. Jeffries, Albert L. Boyd, Buster Wright, Vincent P. Piazza, Jimmie O. Wiley, Howard D. Keplinger, Jr., and Sam J. Gugliotta, and invoke the jurisdiction of this Honorable Court because of the diversity of citizenship of the parties, because there is a federal question involved, and because of the amount of damages claimed, as will hereinafter more fully appear.

Plaintiffs respectfully show unto the Court the following facts, viz.:

1. Plaintiff James G. Glover is a resident citizen of the State of Alabama, his residence address being 616—11th Court, West, Birmingham, Alabama. Plaintiff James C. Dent is a resident citizen of the State of Alabama, his residence address being 328—10th Avenue, S. W., Birmingham, Alabama. Plaintiff William H. Greene, Jr., is a resident citizen of the State of Alabama, his residence address being 1202 North Cahaba Street, Birmingham, Alabama. Plaintiff Paul Cain is a resident citizen of the State of Alabama, his residence address being 312 Miles Avenue, Birmingham, Alabama. Plaintiff Odell Barmore is a resident citizen of the State of New York, his residence address being "O" Lee Place, Freeport, Long Island, New York. Plaintiff Carey Gooden is a resident citizen of the State of Alabama, his residence address being 4429—45th Avenue, North, Birmingham, Alabama. Plaintiff Matthew C. Payne is a resident citizen of the State of Alabama, his residence address being 520 Mildrn Avenue, Birmingham, Alabama. Plaintiff John E. Jeffries is a resident citizen of the State of Alabama, his residence address being 809 Center Place, S. W., Birmingham, Alabama. Plaintiff Albert L. Boyd is a resident citizen of the State of Alabama, his residence address being 1315 Hudson Avenue, Bessemer, Alabama. Plaintiff Buster Wright is a resident citizen of the State of Alabama, his residence address being Route 2, Millport, Alabama. Plaintiff Vincent P. Piazza is a resident citizen of the State of Alabama, his residence address being 120 Bonita Drive, Birmingham, Alabama. Plaintiff Jimmie O. Wiley is a resident citizen of the State of Alabama, his residence address being Dora, Alabama. Plaintiff Howard D. Keplinger, Jr., is a resident citizen of the State of Alabama, his residence address being 7400—52nd Court, North, Birmingham, Alabama. Plaintiff Sam J. Gugliotta is a resident citizen of

the State of Alabama, his residence address being 1409 Creel Street, Birmingham, Alabama.

2. Defendant St. Louis-San Francisco Railroad Company (hereinafter referred to as the Frisco) is a corporation incorporated under the laws of the State of Missouri but which does business in the State of Alabama and in Jefferson County, Alabama, and has a place of business located at 30 South 18th Street, Birmingham, Alabama, and is subject to process by service on Mr. Drayton T. Scott, First National Building, Birmingham, Alabama, who is the statutory agent designated by the Frisco pursuant to Title 7, § 144, of the Cole of Alabama of 1940, as amended. Defendant, Brotherhood of Railway Carmen of America (hereinafter referred to as the Brotherhood), is an unincorporated association, with its national office located in Kansas City, State of Missouri. The Brotherhood does business and has members residing in the State of Alabama and in Jefferson County, Alabama, and is subject to process by service on Mr. John L. Busby, 5731 Third Avenue, North, Birmingham, Alabama, who is the statutory agent designated by the Brotherhood pursuant to Title 7, § 144, of the Code of Alabama of 1940, as amended.

3. Plaintiffs are all employees of defendant Frisco and are classified as Carmen Helpers, also referred to by all of the parties as "Upgrade Carmen." Their job is and has been generally to repair and maintain passenger and freight cars for defendant Frisco in the yard located at Birmingham, Alabama. They are all qualified by experience to do the work of Carmen, a classification to which none of plaintiffs has been promoted. Plaintiffs are all carried on the Carmen Helpers seniority roster of the defendant Frisco with seniority dates as follows:

Name—Seniority Date

James G. Glover—May 8, 1944.

James C. Dent—July 4, 1944.

William H. Greene, Jr.—July 26, 1948.

Paul Cain—September 5, 1948.

Odell Barmore—November 5, 1951.

Carey Gooden—January 12, 1952.

Matthew C. Payne—February 29, 1952.

John E. Jeffries—April 24, 1952.

Albert L. Boyd—April 7, 1953.

Buster Wright—April 16, 1953.

Vincent P. Piazza—June 2, 1953.

Jimmie O. Wiley—June 6, 1956.

Howard D. Keplinger, Jr.—September 11, 1956.

Sam J. Gugliotta—October 10, 1956.

4. Plaintiffs Glover, Dent, Greene, Cain, Barmore, Gooden, Payne, and Jeffries are all Negroes. The remaining plaintiffs are white men. All of the Negro plaintiffs are carried on the seniority roster higher than the white plaintiffs.

5. Plaintiffs are all in theory represented by defendant Brotherhood, and their wages, working conditions, and other employment rights are covered by a Collective Bargaining Agreement executed on their behalf by the Brotherhood and the Frisco on, to-wit, January 1, 1945, and amended on, to-wit, June 1, 1952.

6. In order to avoid calling out Negro plaintiffs to work as Carmen and to avoid promoting Negro plaintiffs to Car-

men, in accordance with a tacit understanding between defendants and a subrosa agreement between the Frisco and certain officials of the Brotherhood, defendant Frisco has for a considerable period of time used so-called "apprentices" to do the work of Carmen instead of calling out plaintiffs to do said work as required by the Collective Bargaining Agreement as properly and customarily interpreted; and the Frisco has used this means to avoid giving plaintiffs work at Carmen wage scale and permanent jobs in the classification of Carmen. This denial to plaintiffs of work as Carmen has been contrary to previous custom and practice by defendants in regard to seniority as far as "Upgrade Carmen" are concerned. Defendant Frisco is not calling any of plaintiffs to work as Carmen in order to avoid having to promote any Negroes to Carmen.

7. Because of the nature of their claim and the failure of defendant Brotherhood to institute any grievance on their behalf, the remedies, if any, provided by grievance machinery in the Collective Bargaining Agreement, the grievance machinery in the constitution of the Brotherhood, and the procedure before the National Railroad Adjustment Board, are all wholly inadequate.

8. Plaintiffs aver that they are the victims of an invidious racial discrimination, and each plaintiff has lost wages in excess of $10,000 as a result of the said discrimination in that they have not been correctly called out to work as Carmen and have not been promoted to Carmen when there have been openings for work and promotion in the Carmen work classification.

9. Plaintiffs bring this action both separately and severally, as a class action, and pray both for the fixing of individual damages and for equitable relief in the form of an injunction to cause defendants to cease and desist from

the aforesaid discrimination in all its aspects. Plaintiffs pray for any further, or different relief as may be meet and propert in the premises.

WILLIAM M. ACKER, JR.,
(William M. Acker, Jr.),
CARL ISAACS,
(Carl Isaacs),
Attorneys for Plaintiffs.

Of Counsel:

SMYER, WHITE, REID & ACKER,
Sixth Floor, Title Building,
Birmingham, Alabama.

MOTION TO DISMISS.

Filed Sep. 2, 1965.

(Title Omitted.)

Comes now individual defendant, St. Louis-San Francisco Railway Company, and respectfully moves this Court to dismiss the above styled action, and as its grounds therefor states that:

1. Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

2. Plaintiffs' Complaint complains of and brings into issue matters over which Congress has delegated exclusive jurisdiction to the National Railroad Adjustment Board.

3. Plaintiffs' Complaint on its face reveals that plaintiffs have collectively and individually failed to exhaust administrative remedies admittedly available to them.

4. Plaintiffs' Complaint has failed to allege proper Federal jurisdiction.

5. Plaintiffs' Complaint has completely failed to allege any facts or circumstances which support plaintiffs' conclusionary claim that they are entitled to work as carmen rather than carmen helpers, which position they admittedly are filling.

6. Plaintiffs have failed to allege any complaint against this defendant over which this Court has jurisdiction, the Complaint stating merely alleged wrongful acts performed by co-defendant.

7. Plaintiffs' Complaint completely lacks necessary allegations to constitute a proper class action.

PAUL R. MOODY,
(Paul R. Moody),

300 Frisco Building,
906 Olive Street,
St. Louis, Missouri 63101,

CABANISS, JOHNSTON, GARDNER & CLARK,
By DRAYTON T. SCOTT,
(Drayton T. Scott),
Attorneys for Defendant, St. Louis-San Francisco Railway Company.

902 First National Bldg.,
Birmingham, Alabama 35203.

MOTION TO DISMISS.

Filed Sep. 29, 1965.

(Title Omitted.)

Defendant, Brotherhood of Railway Carmen of America, an unincorporated association, respectfully moves this Court to dismiss this action, and for grounds shows:

1. Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

2. Plaintiffs' Complaint complains of and brings into issue matters over which Congress has delegated exclusive jurisdiction to the National Railroad Adjustment Board.

3. Plaintiffs' Complaint on its face reveals that plaintiffs have collectively and individually failed to exhaust administrative remedies admittedly available to them.

4. Plaintiffs' Complaint has failed to allege proper Federal jurisdiction.

5. Plaintiffs' Complaint shows upon its face a lack of diversity of citizenship between all the parties in that it alleges that this defendant is an unincorporated association, which association has individual members resident in the State of residence of plaintiffs.

6. Plaintiffs' Complaint fails to allege that plaintiffs collectively or individually have exhausted contractual remedies and procedures admittedly available to them.

7. Plaintiffs' Complaint has completely failed to allege any facts or circumstances which support plaintiffs' conclusionary claim that they are entitled to work as carmen rather than carmen helpers, which position they admittedly are filling.

8. Plaintiffs have failed to allege any complaint against this defendant over which this Court has jurisdiction, the

Complaint merely alleged wrongful acts performed by co-defendant.

9. Plaintiffs' Complaint completely lacks necessary allegations to constitute a proper class action.

MULHOLLAND, HICKEY & LYMAN,
By CLARENCE MULHOLLAND,

741 National Bank Building,
Toledo, Ohio,

COOPER, MITCH, JOHNSTON & CRAWFORD,
By JAMES A. COOPER,
Attorneys for Defendant, Brotherhood of Railway Carmen of America.

1025 Bank for Savings Building,
Birmingham, Alabama.

AMENDED MOTION TO DISMISS.

Filed Sep. 30, 1965.

(Title Omitted.)

Comes the defendant St. Louis-San Francisco Railway Company and amends its motion to dismiss heretofore filed by adding thereto the following additional grounds:

8. Plaintiffs' complaint on its face reveals that plaintiffs have failed to exhaust contractual grievance procedures.

9. Plaintiffs' complaint on its face reveals that plaintiffs have not requested co-defendant, Brotherhood of Railway Carmen of America, to pursue on their behalf

any grievance procedures contained in agreements between the defendants.

10. Plaintiffs' complaint on its face reveals that plaintiffs have not requested co-defendant, Brotherhood of Railway Carmen of America, to pursue on their behalf any grievance procedures contained in agreement between the defendants and that co-defendant, Brotherhood of Railway Carmen of America, if requested, failed to do so.

11. Plaintiffs' complaint on its face reveals that plaintiffs have not requested co-defendant, Brotherhood of Railway Carmen of America, to pursue on their behalf any grievance procedures contained in agreement between the defendants and that co-defendant, Brotherhood of Railway Carmen of America, if requested, failed to do so and that if requested and co-defendant, Brotherhood of Railway Carmen of America, failed to do so, plaintiffs pursued a complaint for failure to do so through the internal grievance procedure of co-defendant, Brotherhood of Railway Carmen of America.

PAUL R. MOODY,
(Paul R. Moody),
300 Frisco Building,
906 Olive Street,
St. Louis, Mo. 63101.

CABANISS, JOHNSTON, GARDNER & CLARK,
By DRAYTON T. SCOTT,
(Drayton T. Scott),
Attorneys for Defendant, St. Louis-San Francisco Railway Company.
902 First National Bldg.,
Birmingham, Ala. 35203.

AMENDED MOTION TO DISMISS.

Filed September 30, 1965.

(Title Omitted.)

Defendant Brotherhood of Railway Carmen of America, an unincorporated association, by leave of Court first had, amends its motion to dismiss, in the following particulars only, by adding:

10. Plaintiffs' complaint on its face discloses that plaintiffs have not requested this defendant to process any grievance on their behalf; have failed to pursue remedies available to them through the internal grievance procedure of the applicable collective bargaining agreement; and have failed to pursue any complaint for failure of this defendant to process any grievance through the applicable internal grievance procedure or appeals procedure available within the union, and have not exhausted the appeals procedure available within the union.

MULHOLLAND, HICKEY & LYMAN,
By CLARENCE MULHOLLAND,

741 National Bank Building,
Toledo, Ohio.

COOPER, MITCH, JOHNSTON & CRAWFORD,
By JEROME A. COOPER,
Attorneys for Defendant, Brotherhood of Railway Carmen of America.

1025 Bank For Savings Building,
Birmingham, Alabama.

MEMORANDUM OPINION.

Filed Jul. 28, 1966.

(Title Omitted.)

This cause, coming on to be heard, was submitted upon the respective motions of the defendants to dismiss this action and upon the briefs and oral arguments of counsel.

Instituted as a class action, plaintiffs assert that this Court has jurisdiction both because of diversity of citizenship and the presence of a federal question.

The allegations of fact in the complaint may be briefly summarized. (1) Plaintiffs are employed by defendant railroad as carmen helpers, known as "Upgrade Carmen" and, although qualified by experience to be carmen, none have been promoted to that classification. (2) Plaintiffs are represented by defendant Union and their employment rights are covered by a collective bargaining agreement negotiated by defendant Union. (3) Defendants have conspired to avoid calling certain Negro plaintiffs to perform work and since the white plaintiffs stand below the Negro plaintiffs on the seniority roster all are thereby being discriminated against. (4) Defendant Railroad uses "apprentices" to perform work in lieu of calling out plaintiffs.

Alleging that they are the victims of an invidious racial discrimination and that each has lost wages in excess of ten thousand dollars as a result thereof, plaintiffs pray for equitable relief enjoining defendants to cease and desist from such discrimination in all its aspects and for award of individual damages.

It affirmatively appears from averments in the complaint that plaintiffs have not availed themselves of remedies provided by grievance machinery in the collective bargaining agreement, the grievance machinery in the constitution of the Brotherhood, and the procedure before the National Railroad Adjustment Board.

This Court is of the opinion that such remedies are to be pursued as a prerequisite to relief in the federal Courts. Neal v. System Board of Adjustment (Mo. Pac. R.), 348 F. 2d 722 (8th Cir. 1965); Wade v. Southern Pacific Co., 243 F. Supp. 307 (S. D. Texas 1965); cf. Haynes v. U. S. Pipe & Foundry Co., ... F. 2d ... (5th Cir. 6-14-66, No. 22727).

The conclusory averment that because of the nature of their claim and the failure of defendant Brotherhood to institute any grievance on their behalf such remedies are wholly inadequate is not equivalent to a contention that they are unavailable. To indulge such a presupposition would be to sterilize procedures adopted to promote industrial peace.

It is noteworthy that there is presently pending on the docket of this Court Civil Action No. 66-65, styled James C. Dent v. St. Louis-San Francisco Railway Company, et al., brought under Title VII of the Civil Rights Act, 42 U. S. C. A., § 2000e, wherein identical relief is sought for members of the class represented by the plaintiffs herein.

For failure of the complaint to state a claim upon which relief can be granted an order will be entered dismissing this action.

Done, this the 28th day of July, 1966.

SEYBOURN H. LYNNE,
Chief Judge.

A True Copy.

WILLIAM E. DAVIS,
Clerk, United States District Court,
Northern District of Alabama,
By MARY L. TORTORICI,
Deputy Clerk.

(Seal)

ORDER.

Filed July 28, 1966.

(Title Omitted.)

In conformity with the memorandum opinion of the Court contemporaneously entered herein:

It Is Ordered, Adjudged and Decreed by the Court that this action be and the same is hereby dismissed without prejudice.

Done, this the 28th day of July, 1966.

SEYBOURN H. LYNNE,
Chief Judge.

A True Copy.

WILLIAM E. DAVIS,
Clerk, United States District Court, Northern District of Alabama,
By MARY L. TORTORICI,
(Seal) Deputy Clerk.

MOTION TO SET ASIDE OR TO AMEND ORDER OF DISMISSAL.

Filed Aug. 4, 1966.

(Title Omitted.)

Come now all plaintiffs in the above styled cause and respectfully show unto the Honorable Court and aver as follows:

1. In plaintiffs' brief in opposition to the motions to dismiss, plaintiffs said in conclusion as follows:

If the Court should disagree with this brief and should agree with defendants' contention that the complaint is insufficient to demonstrate jurisdiction, then plaintiffs respectfully request that the order of this Court set out wherein the complaint is insufficient and that the Court allow plaintiffs time within which to amend their complaint to supply any deficiencies.

2. Certain of the alleged deficiencies relied upon by the Court in the Decree of Dismissal entered on, to-wit, July 28, 1966, can be obviated by averments to be contained in a proposed amendment to the complaint, more particularly, averments to the effect that plaintiffs did make bona fide but unsuccessful and frustrating attempts to avail themselves of the purported administrative remedies provided by the Union constitution and the collective bargaining agreement.

Wherefore Premises Considered, plaintiffs respectfully move that the order of Dismissal entered on, to-wit, July 28, 1966 be set aside or appropriately amended for the sole and limited purpose of allowing plaintiffs a reasonable time within which to amend their complaint.

WILLIAM M. ACKER JR.,
(William M. Acker, Jr.),
CARL ISAACS,
(Carl Isaacs),
Attorneys for Plaintiffs.

Of Counsel:

SMYER, WHITE, REID &
ACKER,
600 Title Building,
Birmingham, Alabama.

ORDER.

Filed September 19, 1966.

(Title Omitted.)

This cause, coming on to be heard, was submitted upon the motion filed in behalf of plaintiffs to set aside or to amend the order of dismissal entered herein on July 28, 1966, in conformity with the memorandum opinion contemporaneously entered therewith. Treating such motion as a motion to amend the complaint to cure the defects points out in such memorandum opinion:

It is Ordered, Adjudged and Decreed by the Court that plaintiffs are granted leave to amend their complaint on or before September 30, 1966, if they are so advised.

Done, this the 16th day of September, 1966.

SEYBOURN H. LYNNE,
Chief Judge.

AMENDMENT TO COMPLAINT.

Filed Sep. 29, 1966.

(Title Omitted.)

Comes now James G. Glover, James C. Dent, William H. Greene, Jr., Paul Cain, Odell Barmore, Carey Gooden, Matthew C. Payne, John E. Jeffries, Albert L. Boyd, Buster Wright, Vincent P. Piazza, Jimmie O. Wiley,

Howard D. Keplinger, Jr., and Sam G. Gugliotta, plaintiffs in the above styled cause, and, with leave of the Court already had and obtained, amend their complaint by changing paragraph 7 thereof so that it will read as follows:

7. On many occasions the Negro plaintiffs through one or more of their number, have complained both to representatives of the Brotherhood and to representatives of the Company about the foregoing discrimination and violation of the Collective Bargaining Agreement. Said Negro plaintiffs have also called upon the Brotherhood to process a grievance on their behalf with the Company under the machinery provided by the Collective Bargaining Agreement. Although a representative of the Brotherhood once indicated to the Negro plaintiffs that the Brotherhood would "investigate the situation", nothing concrete was ever done by the Brotherhood and no grievance was ever filed. Other representatives of the Brotherhood told the Negro plaintiffs time and time again: (a) that they were kidding themselves if they thought they could ever get white men's jobs; (b) that nothing would ever be done for them; and (c) that to file a formal complaint with the Brotherhood or with the Company would be a waste of their time. They were told the same things by local representatives of the Company. They were treated with condescension by both Brotherhood and Company, sometimes laughed at and sometimes "cussed", but never taken seriously. When the white plaintiffs brought their plight to the attention of the Brotherhood, they got substantially the same treatment which the Negro plaintiffs received, except that they were called "nigger lovers" and were told that they were just inviting trouble. Both defendants attempted to intimidate plaintiffs, Negro and white. Plaintiffs have been completely frustrated in their efforts to present their grievance either to the Brotherhood or to the Company. In addition, to employ the

purported internal complaint machinery within the Brotherhood itself would only add to plaintiffs' frustration and, if ever possible to pursue it to a final conclusion it would take years. To process a grievance with the Company without the cooperation of the Brotherhood would be a useless formality. To take the grievance before the National Railroad Adjustment Board (a tribunal composed of paid representatives from the Companies and the Brotherhoods) would consume an average time of five years, and would be completely futile under the instant circumstances where the Company and the Brotherhood are working "hand-in-glove". All of these purported administrative remedies are wholly inadequate, and to require their complete exhaustion would simply add to plaintiffs' expense and frustration, would exhaust plaintiffs, and would amount to a denial of "due process of law", prohibited by the Constitution of the United States.

WILLIAM M. ACKER, JR.,
(William M. Acker, Jr.),
CARL ISAACS,
(Carl Isaacs),
Attorneys for Plaintiffs.

Of Counsel:

SMYER, WHITE, REID &
ACKER,
6th Floor, Title Building,
Birmingham, Alabama.

MOTION TO DISMISS AMENDMENT TO COMPLAINT AND TO ADHERE TO ORDER OF DISMISSAL.

Filed Oct. 12, 1966.

(Title Omitted.)

Comes now St. Louis-San Francisco Railway Company, one of the defendants in this cause, and moves that the Amendment to Complaint be dismissed, that the Order of Dismissal entered by the Court in this cause on July 28, 1966 be adhered to, and that the Complaint as last amended be dismissed, and as grounds therefor, asserts as follows, separately and severally:

1. The allegations of the Amendment to Complaint do not cure the defects of the Complaint, pointed out in the Court's Memorandum Opinion of July 28, 1966, that "plaintiffs have not availed themselves of remedies provided by the grievance machinery in the collective bargaining agreement, the grievance machinery in the constitution of the Brotherhood, and the procedure before the National Railroad Adjustment Board."

2. The allegations of the Amendment to Complaint are no more than conclusionary averments of alleged futility and not the unavailability of remedies which must exist in order to justify their disregard.

3. It affirmatively appears from the allegations of the Amendment to Complaint that "no grievance was ever filed" under the grievance procedure of the collective bargaining agreement, although the plaintiffs could have done so and may do so.

4. The allegations of the Amendment to Complaint show on their face that the plaintiffs have not attempted to

pursue their internal remedies within the Brotherhood, that they have not attempted to process a grievance with this defendant, and that they have not attempted to pursue their remedies before the National Railroad Adjustment Board.

5. The allegations of the Amendment to Complaint show on their face that the plaintiffs have not collectively and individually pursued or exhausted the administrative remedies admittedly available to them and instead seek to justify their disregard by averments of alleged futility and alleged time involved in the use of such remedies.

DRAYTON T. SCOTT,
(Drayton T. Scott),
WILLIAM F. GARDNER,
(William F. Gardner),
PAUL R. MOODY,
(Paul R. Moody),
CABANISS, JOHNSTON,
GARDNER & CLARK.

901 First National Building,
Birmingham, Alabama.

MOTION TO DISMISS AMENDMENT TO COMPLAINT.

Filed Oct. 19, 1966.

(Title Omitted.)

Comes now defendant Brotherhood of Railway Carmen of America, an unincorporated association, and files this motion to dismiss the complaint as last amended, and as grounds therefor shows:

1. The amendment to the complaint fails to allege sufficient facts to establish that plaintiffs have availed themselves, as set forth in the Court's Memorandum Opinion of July 28, 1966, "of remedies provided by grievance machinery in the collective bargaining agreement, the grievance machinery in the constitution of the Brotherhood, and the procedure before the National Railroad Adjustment Board."

2. The amendment to the complaint fails to allege facts to establish that the plaintiffs have separately or collectively exhausted administrative remedies available to them by virtue of the contract, grievance machinery and constitution of this defendant and by law before the National Railroad Adjustment Board and does not allege facts that would relieve plaintiffs of such failure.

MULHOLLAND, HICKEY & LYMAN,
By DONALD W. FISHER, ESQ.,

741 National Bank Building,
Toledo, Ohio 43604.

COOPER, MITCH & CRAWFORD,
By JEROME A. COOPER,
Attorneys for Defendant, Brotherhood of Railway Carmen of America.

1025 Bank for Savings Bldg.,
Birmingham, Alabama.

ORDER.

Filed November 8, 1966.

(Title Omitted.)

This cause, coming on to be heard, was submitted to the Court on defendants' motions to dismiss the complaint as amended.

Upon consideration of said motions, and it appearing to the Court that the amendment to the complaint filed herein on September 29, 1966, does not cure the defects pointed out in the memorandum opinion of this Court entered herein on July 28, 1966, it is the opinion of the Court that this action is due to be dismissed.

Accordingly, it is Ordered, Adjudged and Decreed by the Court that this action be and the same is hereby dismissed.

Done, this the 7th day of November, 1966.

SEYBOURN H. LYNNE,
Chief Judge.

A True Copy.

WILLIAM E. DAVIS,
Clerk, United States District Court, Northern District of Alabama,
By MARY L. TORTORICI,
Deputy Clerk.

(Seal)

NOTICE OF APPEAL.

Filed Nov. 28, 1966.

In the United States District Court for the Northern District of Alabama, Southern Division.

James G. Glover, et al., Plaintiffs,

vs.

Civil Action No. 65-477.

St. Louis-San Francisco Railway Company, et al., Defendants.

Come now James G. Glover, James C. Dent, William H. Green, Jr., Paul Cain, Odell Barmore, Carey Gooden, Matthew Payne, John E. Jeffries, Albert L. Boyd, Buster Wright, Vincent P. Piazza, Jimmie O. Wiley, Howard D. Keplinger, Jr., and Sam B. Gugliotta and respectfully appeal to the United States Court of Appeals for the Fifth Circuit from the judgment and decree entered in this cause, on, to-wit, November 7, 1966, sustaining defendants' motion to dismiss and dismissing the complaint as amended. Plaintiffs-Appellants hereby request the Clerk to mail copies of this notice in accordance with Rule 73 (b) of the Federal Rules of Civil Procedure.

WILLIAM M. ACKER, JR.,
(William M. Acker, Jr.),
CARL ISAACS, JR.,
(Carl Isaacs, Jr.),
Attorneys for Plaintiffs-Appellants.

APPEAL BOND.

Filed Nov. 28, 1966.

(Title Omitted.)

State of Alabama,
Jefferson County.

We, the undersigned, jointly and severally, hereby acknowledge ourselves security for costs of the appeal in this cause to the United States Circuit Court of Appeals for the Fifth Circuit up to and including the sum of Two Hundred Fifty and no/100 ($250.00) Dollars. We hereby agree to pay all appeal costs not exceeding said sum if the appeal is dismissed or the judgment affirmed (or such costs as the appellate Court may award if the judgment is modified).

JAMES G. GLOVER,
JAMES C. DENT,
WILLIAM H. GREEN, JR.,
PAUL CAIN,
ODELL BARMORE,
CAREY GOODEN,
MATTHEW PAYNE,
JOHN E. JEFFRIES,
ALBERT L. BOYD,
BUSTER WRIGHT,
VINCENT P. PIAZZA,
JIMMIE O. WILEY,
HOWARD D. KEPLINGER, JR.,
SAM G. GUGLIOTTA,

By WILLIAM M. ACKER, JR., (L.S.),
(William M. Acker, Jr.),
Attorney-in-Fact,
SHUFORD B. SMYER, (L.S.),
(Shuford B. Smyer),
CARL ISAACS, JR., (L.S.),
(Carl Isaacs, Jr.).

CLERK'S CERTIFICATE.

United States of America,
Northern District of Alabama.

I, WILLIAM E. DAVIS, Clerk of the United States District Court for the Northern District of Alabama do hereby certify that the foregoing pages numbered from one (1) to thirty-one (31), both inclusive, comprise the original pleadings in the foregoing civil action and are herewith attached as a full, true and correct transcript of the record on appeal in the Matter of James G. Glover, et al., Appellants, vs. St. Louis-San Francisco Railway Company, et al., Appellees, Civil Action 65-477, Southern Division, as fully as the same appears of record and on file in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of said Court at Birmingham, Alabama, in said District, on this the 1st day of December, 1966.

WILLIAM E. DAVIS,
(William E. Davis),
Clerk, United States
District Court.

(Seal)

OPINION.

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 24288

JAMES G. GLOVER, ET. AL.,

Appellants,

versus

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ET AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

(December 5, 1967.)

Before RIVES, GOLDBERG and DYER, Circuit Judges.

PER CURIAM: We agree with the opinion and decision of the district court. In addition to the authorities there cited, see *Republic Steel Corporation v. Maddox*, 1965, 379 U.S. 650; *Walker v. Southern Railway Co.*, 1966, 385 U.S. 196, *Vaca v. Sipes*, 1967, 386 U.S. 171; *Steen v. Local Union No. 163*, 6 Cir. 1967, 373 F.2d 519; *Howard v. St. Louis-San Francisco Railway Co.*, 8 Cir. 1966, 361 F.2d 905. The judgment is

AFFIRMED.

JUDGMENT.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1967

No. 24288

D. C. Docket No. CA 65-477

JAMES G. GLOVER, ET AL.,
Appellants,

versus

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ET AL.,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

Before RIVES, GOLDBERG and DYER, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, James G. Glover, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

December 5, 1967.

Issued as Mandate: Dec. 27, 1967.

Certificate of Service.

I, William M. Acker, Jr., of counsel for petitioners, hereby certify that I have mailed by U. S. Mail, postage pre-paid, three (3) copies of the foregoing appendix to Messrs. Cabaniss, Johnston, Gardner & Clark, First National Building, Birmingham, Alabama 35203, attorneys-of-record for St. Louis-San Francisco Railway Co. and three (3) copies to Messrs. Cooper, Mitch & Crawford, Bank for Savings Building, Birmingham, Alabama 35203, attorneys-of-record for Brotherhood of Railway Carmen of America, this ... day of June, 1968.

.....

William M. Acker, Jr.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. [redacted] 38

JAMES G. GLOVER et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR WRIT OF CERTIORARI.

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Cases Cited.

Statutes Cited.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

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JAMES G. GLOVER et al.,
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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

James G. Glover, James C. Dent, William H. Greene, Jr., Paul Cain, Odell Barmore, Carey Gooden, Matthew C. Payne, John E. Jeffries, Albert L. Boyd, Buster Wright, Vincent P. Piazza, Jimmie O. Wiley, Howard D. Keplinger, Jr., and Sam J. Gugliotta, by their attorneys, respectfully request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered on December 5, 1967.

THE OPINION BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit in question, rendered December 5, 1967, is reported at 386 F. 2d 452 (5th Cir., 1967). A full, true, and correct copy of the opinion and judgment thereon is appended hereto (Appendix pp. 51, 52). The complete record of proceedings in the United States District Court for the Northern District of Alabama, Southern Division, is also appended hereto (Appendix pp. 53 through 77).

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

This case involves racial discrimination in employment practices. The primary issue is whether or not petitioners, as railroad employees, must exhaust to an endless end three separate supposed administrative remedies before bringing suit in the Federal Courts when petitioners have alleged facts showing that an attempt to exhaust the remedies was made and that all remedies are futile and inadequate. The courts below agreed with the "hand-in-glove" contentions of Company and Union that the doors of the Federal Courts are closed because petitioners have not taken their grievance through all stages of the supposed internal grievance machinery of the Brotherhood Constitution, through all stages of the grievance machinery set up in the contract, and through the procedures of the National Railroad Adjustment Board. If the Court of Appeals is correct in requiring an exhaustion of all three of these alleged remedies, secondary problems and issues appear, i. e., the proper order in which the said remedies should be exhausted, and who has

the burden of pleading and proving (a) the existence of administrative remedies and (b) a failure to exhaust such administrative remedies.

STATUTE INVOLVED.

A portion of the Railway Labor Act is involved. It is 45 U. S. C., § 153 (First) (i), which reads as follows:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

STATEMENT OF THE CASE.

Petitioners invoked the jurisdiction of the District Court because of diversity of citizenship of the parties, because there is a federal question involved, and because the damages claimed exceeded Ten Thousand ($10,000.00) Dollars. The original complaint (Appendix pp. 54-59) charged that respondents, St. Louis-San Francisco Railway Company, and Brotherhood of Railway Carmen of America, have between them a tacit understanding and subrosa agreement to use white so-called "apprentices," to perform the work of "carmen" in order to keep from providing petitioners, who are classified as "carmen helpers," enough hours as "carmen" to permit promotion

to "carmen" as called for by the contract. The reason for this scheme is to deprive the Negro petitioners of job promotion. It has the incidental and secondary result of denying the same promotion opportunity to the white petitioners who happen to stand on the "carmen helper" seniority roster behind the Negro petitioners. Petitioners, Negro and white together, seek an end to this discrimination, and further seek to recover the lost wages resulting from past discrimination. On motions to dismiss, which were unaccompanied by any affidavit or pleading showing the structure, or even the existence, of internal grievance procedure (Appendix pp. 59-64), the District Court wrote on opinion (Appendix pp. 65-66). The District Court dismissed the action on the ground that petitioners "have not availed themselves of remedies provided by grievance machinery in the collective bargaining agreement, the grievance machinery in the constitution of the Brotherhood, and the procedure before the National Railroad Adjustment Board (Appendix p. 65). The Trial Court went on to say:

> The conclusory averment that, because of the nature of their claim and the failure of defendant Brotherhood to institute any grievance on their behalf such remedies are wholly inadequate is not equivalent to a contention that they are unavailable. To indulge such a presupposition would be to sterilize procedures adopted to promote industrial peace (Appendix p. 66).

Then going outside of the record, the District Court parenthetically noted that Mr. Dent (one out of the fourteen plaintiffs) had a pending suit under Title 7 of the Civil Rights Act, 42 U. S. C. A., § 2000 e, asking for what the court described as "identical relief" (Appendix p. 66). The court apparently placed no reliance on this fact, in rendering its decision, and the statement that the relief sought was identical is patently incorrect. Furthermore, since the opinion of the District Court in the instant

case, the same court has also dismissed the Dent case brought under the Civil Rights Act for the alleged failure of the Equal Employment Opportunity Commission to invoke conciliation procedures. That case, with completely different counsel for Mr. Dent, is now on appeal to the Fifth Circuit.

After the decree dismissing the original complaint, petitioners, by permission (Appendix pp. 67-69), amended their complaint, adding the following averments to further demonstrate the factual futility of their attempts to employ the collective bargaining machinery and the so-called internal grievance procedures of the Brotherhood:

> 7. On many occasions the Negro plaintiffs through one or more of their number, have complained both to representatives of the Brotherhood and to representatives of the Company about the foregoing discrimination and violation of the Collective Bargaining Agreement. Said Negro plaintiffs have also called upon the Brotherhood to process a grievance on their behalf with the Company under the machinery provided by the Collective Bargaining Agreement. Although a representative of the Brotherhood once indicated to the Negro plaintiffs that the Brotherhood would "investigate the situation," nothing concrete was ever done by the Brotherhood and no grievance was ever filed. Other representatives of the Brotherhood told the Negro plaintiffs time and time again: (a) that they were kidding themselves if they thought they could ever get white men's jobs; (b) that nothing would ever be done for them; and (c) that to file a formal complaint with the Brotherhood or with the Company would be a waste of their time. They were told the same things by local representatives of the Company. They were treated with condescension by both Brotherhood and Company, sometimes laughed at and sometimes "cussed," but never taken seriously.

> When the white plaintiffs brought their plight to the attention of the Brotherhood, they got substantially the same treatment which the Negro plaintiffs received, except that they were called "nigger lovers" and were told that they were just inviting trouble. Both defendants attempted to intimidate plaintiffs, Negro and white. Plaintiffs have been completely frustrated in their efforts to present their grievance either to the Brotherhood or to the Company .... (Appendix pp. 69-71).

Following the amendment of the complaint, and upon motions to dismiss, the District Court found that the amendment did not cure the defect of non-exhaustion of administrative remedies and dismissed the action (Appendix p. 74). On appeal to the Court of Appeals, that court agreed with the opinion of the District Court (Appendix p. 51).

REASONS FOR GRANTING THE WRIT:

ARGUMENT.

Neither the District Court nor the Court of Appeals bothered to suggest which of the proposed administrative remedies petitioners should employ first in the long and devious road described as the only road to relief. They simply held that petitioners must exhaust all three remedies (Appendix p. 65). The original complaint does not even allege that there actually exists an administrative remedy within the Frisco or within the Brotherhood. It referred to "remedies, if any" (Appendix p. 58) (emphasis supplied). And yet, the opinion of the District Court, without any reference to affirmative proof by defendants of the existence of real administrative remedies, facilely jumps to the conclusion that as a matter of fact such remedies exist. It makes sense, of course, for a court to take judicial knowledge of the National Railroad Ad-

justment Board and of its jurisdiction, but how the District Court and the Court of Appeals concludes that these other two remedies are available without affirmative proof, remains unanswered. As it stands now, petitioners have been admonished to go three separate and long administrative routes, none of which holds any prospect of success, it being anyone's guess which route to follow first.

In this posture, it is necessary to examine the law generally with regard to the exhaustion of contractual administrative remedies, and separately the N. R. A. B., which is statutory. There is a definite distinction between contractual remedies (such as intra-union procedures, and those provided by collective bargaining agreements) and an N. R. A. B. complaint. Thus, a separate examination of these two types of remedies will be made.

The Exhaustion of Company and Union Grievance Machinery:

The District Court grounded its decision on **Neal v. System Board of Adjustment**, 348 F. 2d 722 (8th Cir., 1965), on **Wade v. Southern Pacific Co.**, 243 F. Supp. 307 (S. D., Texas, 1965), and on rehearing, 248 F. Supp. 493 (1965), and on **Haynes v. U. S. Pipe & Foundry Co.**, 362 F. 2d 414 (5th Cir., 1966).

The **Haynes** case is easily distinguishable on the ground that appellant in that case had exhausted his administrative remedies, did not contend that the Union had not faithfully represented him, and did not charge fraud or collusion on the part of the Union and the Company.

While the **Neal** and **Wade** cases may at first glance appear to hold that contractual and internal union remedies are inevitable prerequisites to court action, both cases provide an exception here applicable. In the **Neal** case, the court at page 726 of 348 F.2d, stated:

> With these internal remedies so definitely available, resort to them, **or an adequate reason for failure so to do,** is a prerequisite to equitable relief against the union or its officers in federal courts (emphasis supplied).

In the **Neal** case the constitution of the union had been introduced. The constitution is not presented in the instant case. Apparently no "adequate reason for failure" to pursue such a remedy was alleged, argued, or even existed in **Neal.**

In the **Wade** case, the Texas District Court found as a fact, and stated at page 311 of 243 F. Supp.:

> Plaintiffs **have made no effort whatsoever** to present a grievance through these procedures [those provided by the collective bargaining agreement] (emphasis supplied).

Nevertheless, the very last paragraph of the opinion in **Wade,** and the final holding, raise questions as to what an employee must do, as well as the question as to whether employee or defendant bears the burden of proving what the employee did or did not do. That court at page 313, said:

> Therefore, **upon the submission by the defendants of evidence** that (1) contract grievance procedures existed **which the plaintiffs did not request** the union to pursue on their behalf, and/or (2) **that internal union grievance procedures existed** and although the union was requested to process the employee's grievance, which it failed to do, the employee did not pursue a complaint for failure to do so against the union through its internal grievance procedure, the Court will act upon the defendants' motion to dismiss (emphasis supplied).

From the **Wade** case it would appear only that an employee must "request" or make an "effort" to pursue

contractual remedies. The case does not say that the "request" or "effort" must be carried to a logical and final conclusion (or an illogical conclusion, depending upon the viewpoint). Petitioners in the instant case did allege that they made an effort and made a request of the Brotherhood, and furthermore that the Brotherhood refused to process any grievance and even laughed at plaintiffs. If **Wade** means that an employee must also pursue his complaint against the Union through its internal procedure, Petitioners must admit that they did not allege facts showing a full scale exhaustion of themselves within the morass of any such internal Union machinery, if it existed. Nevertheless, on the question of burden of proof, **Wade** indicates that the defendant union must "submit evidence . . . . that internal union grievance procedures existed". In the instant case, the Brotherhood has submitted no such evidence. Neither the contract nor the constitution of the union has been introduced, and neither is a part of the record. As a matter of "off-the-record" fact, neither the contract nor the constitution of the Brotherhood contain any provision whereby a member may process a grievance without local Union support, and under the union constitution, any member who attempts to do so would be subject to revocation of his Union membership. Petitioners would be happy, if allowed to do so, to join issue on the question of practical availability of these remedies through a segregated "Jim Crow" local to which the Negro Petitioners belong. It would be unduly burdensome, however, for petitioners to attach to their complaint the entire Union Constitution and collateral facts in order to meet a fancied threshold requirement that they demonstrate the absence of complaint machinery in the Union. The **Wade** case is logical in placing such a burden on the defendant. The decision in the **Wade** case on rehearing, 248 F. Supp. 493 (1965), shows exactly what defendants were required to prove

> We therefore construe the statute to mean that a member . . . **may** (emphasis ours) be required **by that court or agency** (emphasis theirs) to exhaust internal remedies . . .

In other words, whether or not a member must exhaust internal remedies is a matter of discretion with each court in each individual case, and neither statute nor case law is absolutely binding on a court in every case. See also **McGraw v. United Association of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry**, 341 F. 2d 705 (C. A., Tenn., 1965).

The court in **Detroy** made an additional interesting comment at p. 81 of 286 F. 2d:

> Taking due account of the declared policy favoring self-regulation by unions, we nonetheless hold that where the internal union remedy is **uncertain** and has not been **specifically brought to the attention of the disciplined party, the violation of federal law** clear and undisputed, and the injury to the union member immediate and difficult to compensate by means of a subsequent money award, exhaustion of union remedies ought not to be required (emphasis supplied).

In yet another case involving disciplinary action of a union member, **Farowitz v. Associated Musicians of Greater New York**, 330 F. 2d 999 (2nd Cir., 1964), Judge Lumbard used the following language at p. 1002:

> . . . it is clear that where there is reason to believe that resort to an appeal within the union would be a **futility** it is not necessary to follow such a course as a prerequisite to legal action (emphasis supplied).

As previously pointed out, the Fifth Circuit in **Calagaz**, *supra*, concurred in using the word "futile." In the **Farowitz** case the Union attempted to discipline a member who had urged other members not to pay taxes and dues

assessed by the Union because the taxes and dues were illegal; and the assessment of the taxes and dues was, in fact, illegal. Under such circumstances an appeal through internal union procedures would be a futility, and the reviewing court so found. The same can readily be said in the instant case.

In **Simmons v. Avisco, Local 713, Textile Workers Union**, 350 F. 2d 1012 (4th Cir., 1965), the Fourth Circuit quoted Judge Lumbard verbatim (as the court in **Thompson v. New York Central**, *supra*, did) and said:

> It has been held, both at common law and under the Act that internal union remedies need not be exhausted where the action taken by the union is "void". This rather elastic term has been applied to proceedings where no proper notice was given, **where the tribunal was biased**, where the offense charged was not one specified in the union constitution or where there have been other substantial jurisdictional defects, **or a lack of fundamental fairness.** As recognized by Chief Judge Lumbard in **Libutti** . . ., the concept of voidness lacks precision, and its use may necessitate a hearing on the merits before a ruling on exhaustion can be made. He (Lumbard) points out, however, that "**(w)hen conceded or easily determined facts show a serious violation of the plaintiff's rights, the reasons for requiring exhaustion are absent**" (emphasis supplied).

In **Rensch v. General Drivers Helpers and Trust Terminal Employees, Local No. 120**, 129 N. W. 2d 341 (1964), suit was brought in a Minnesota state court against the Union for breach of an employment contract. As to the requirement of exhaustion of internal remedies the Supreme Court of Minnesota said at p. 346 of 129 N. W. 2d:

> However, the purposes of the rule are not served when the remedies are **inadequate** . . . even though . . . available. To require exhaustion in such cases

would be to permit use of the rule as a defensive vehicle to avoid granting any relief to a member by adding delay and expensive . . . . procedures . . . Where remedies are in fact not available to afford such relief, or where their availability is dependent upon a tortured or unjustified interpretation of the Constitution or by-laws, it is rather uniformly held that the remedies are **illusory** and need not be exhausted (emphasis supplied).

One of the most recent cases is **Foy v. Norfolk & W. R. Co.**, 377 F. 2d 243 (4th Cir., 1967), in which the Fourth Circuit joined in the recognition of the possibility of a showing of futility or that the remedies are inadequate in order to avoid their exhaustion as a prerequisite to suit.

In summary, there is much case law under the Railway Labor Act, under the Labor-Management Reporting and Disclosure Act, and under plain old common law, to the effect that contractual and internal grievance procedures do not have to be exhausted in all cases, and especially do not have to be exhausted where the remedy is wholly inadequate or where there is a "violation of a fundamental right," as in **Libutti v. Di Brizzi**, *supra*. It is noteworthy that not a single one of these cases stated reasons more cogent for not exhausting remedies than have been stated in the amended complaint in the instant case. Not a single case stated the "violation of a fundamental right" which is so basic and so important as the right to be free of racial discrimination in one's employment.

Petitioners believe that this Honorable Court would not have required exhaustion of the contractual remedy in **Republic Steel v. Maddox**, *supra*, if the claim had been one of racial discrimination. The **Maddox** case, decided in 1965, and relied upon heavily by Respondents in the Court of Appeals, was a simple suit by a discharged employee for back wages. There was no claim that his bargaining agent and company were "in cahoots". **Maddox** most certainly

did not involve a claim of racial discrimination by either Union or Employer, much less by Union and Employer. It was a case where the grievance machinery provided by the collective bargaining agreement could fairly operate. If Mr. Maddox had alleged facts showing racial discrimination by his Employer, participated in by his Union (circumstances where the grievance machinery could not fairly operate), Petitioners respectfully suggest that the result would have been different.

Few legal analysts would make a fetish of extra-judicial remedy exhaustion, as the lower courts have done here. In "Exhaustion of Remedies Under Collective Bargaining Agreements: A Reappraisal," 54 Northwestern L. Rev. 605 (1959-1960), the writer at p. 615 rightly concludes that:

> . . . in order to promote fairness to the employee, the futility exception should be more liberally applied where the union and/or employer are either hostile or refuse to cooperate in the use of the grievance machinery.

Speaking of the inadequacy of grievance machinery without the Union's cooperation, the "Report of Committee on Improvement of Administration of Union Management Agreements, 1954," 50 Northwestern L. Rev. 143 (1955) at p. 168 says:

> Beyond the first step, the grievance procedure usually makes no provision for the individual. The customary agreement provides that the appeal shall be taken by designated union officers to the next highest level of management. The agreement gives the individual no power to decide whether an appeal will be taken and no voice in presenting the appeal. The individual grievance, in such cases, can not follow the letter of the contractual grievance procedure.[1]

---

[1] See also 37 N. Y. U. L. Rev. 362 (1962), Summers, "Individual Rights in Collective Agreements and Arbitration", at

efore their motion to dismiss was granted, and also hows how they proved it.

Another case which places the burden of proving the vailability of internal Union grievance procedure on de-endant is **Forline v. Helpers Local No. 42**, 211 F. Supp. 315 (D. C. E. D., Pa., 1962), decided under the Labor-Management Reporting and Disclosure Act. At page 317 of 211 F. Supp., that court said:

> To effectuate those policies the issue of exhaustion of remedies should be disposed of as early in the proceedings as practicable. **In appropriate cases it may be determined preliminarily upon motion, but it cannot be resolved in a vacuum.** Where a union moves to dismiss the complaint, it should place before the Court **facts** (emphasis theirs) establishing that union remedies are available to the plaintiff and that plaintiff has neglected to use them. This may be accomplished in many ways, by means of exhibits, affidavits, depositions, etc. Defendants, here, however, have placed no facts in the record, they have merely attached to their brief what purports to be a copy of the union Constitution. The union Constitution has not been made part of the record, but even if it had, that document, in and of itself, falls short of establishing that plaintiffs have failed to take advantage of the available reasonable union procedures (emphasis supplied except where otherwise designated).

The motion to dismiss in the **Forline** case was denied without prejudice so as to allow the submission of proof that internal Union remedies did in fact exist.

Again in **Associated Orchestra Leaders of Greater Philadelphia v. Philadelphia Musical Society, Local 77, of the Amer. Fed. of Musicians**, 203 F. Supp. 755 (D. C. E. D., Pa., 1962), the defendant's motion to dismiss was denied on this same ground. The court said at page 760:

> Nor have defendants pointed out to us any procedures specified in its Constitution or By-Laws whereby members aggrieved by such union action could secure relief.

The Pennsylvania District Court further cited the case of **Detroy v. American Guild of Variety Artists**, 286 F. 2d 75 (2nd Cir., 1961), cert. denied 366 U. S. 929, 81 S. Ct. 1650, 6 L. ed. 2d 388 (1961), in which Judge Lumbard denied defendant's motion to dismiss because the internal Union remedies had not been specifically brought to the attention of the union member, and because such remedies were, as he phrased it, "**uncertain**".

In **Thomas v. The Penn Supply and Metal Corporation**, 35 F. D. R. 17 (D. C., E. D., Pa., 1964), the court held at p. 19:

> In this regard, the "Union" should, on a motion to dismiss the complaint, place before the Court facts to establish that union remedies are available and that plaintiffs have neglected their utilization. A copy of the Union Constitution attached to the "Union's" brief in support of their motion does not fulfill their obligation to present **facts** to the court which would establish plaintiff's failure to follow available, reasonable procedures. A failure would warrant dismissal, but such a failure must be shown by the moving party. **Bey et al. v. Muldoon et al.**, 217 F. Supp. 404 (E. D., Pa., 1963); . . . (emphasis supplied).

As in the **Neal** and **Wade** cases, *supra*, other courts leave the door of the courts ajar, if not wide open, by providing exceptions to the rule that contractual and internal remedies must be exhausted. The **Wade** case uses the words "request" and "effort". Other cases use other words, like "attempt," "futile," "illusory," "void," "uncertain," "inadequate," and "adequate reason for failure to do so." For example, in the case of **Republic**

Steel Corp. v. Maddox, 379 U. S. 650, 85 S. Ct. 614, 13 L. ed. 2d 580 (1965),[1] the Supreme Court said at p. 583 of 13 L. ed. 2d:

> As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must **attempt** (Court's emphasis) use of the contract grievance procedure agreed upon by employer and union as the mode of redress . . . And it cannot be said, **in the normal situation** that contract grievance procedures are **inadequate** to protect the interests of an aggrieved employee until the employee has **attempted to implement the procedures and found them so** (emphasis supplied except where otherwise designated).

One of the very latest cases on the subject uses yet another, and most interesting, word to describe a reason for not insisting on complete exhaustion of contract remedies. In **Thompson v. New York Central Railroad Co.**, 250 F. Supp. 175 (S. D. N. Y. 1966), plaintiffs sued the Brotherhood of Railway Carmen of America (Respondents here) and the New York Central Railroad and alleged unfair representation and hostile discrimination (but not racial), invoking the R. L. A. and also claiming they were unlawfully disciplined under the L. M. R. D. A. The court again stated that the general rule under the R. L. A. is that internal remedies must first be pursued and pointed out that the L. M. R. D. A., 29 U. S. C., § 411 (a) (4) expressly provides that a Union may require its members to exhaust internal remedies before seeking redress in the courts. Nevertheless, the court stated at p. 176:

> Plaintiffs are excused from exhaustion of internal union remedies under the R. L. A. when they allege facts to sustain a finding that it would be **futile** to do so (emphasis supplied).

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[1] Cited by the Court of Appeals in its opinion of December 5, 1967.

Since none of these cases shed much light on the breadth of such words as "futile," "attempt," "request," "uncertain," or "an adequate reason for failure to resort to internal remedies," as excuses for avoiding administrative procedures, Petitioners respectfully point to several cases which may shed more light. The following cases, although not always on point factually, are some of the cases which have excused the exhaustion of internal remedies or have held that such exhaustion was unnecessary.

In **Fingar v. Seaboard Air Line Railroad Company**, 277 F. 2d 6 8 (5th Cir., 1960), upon which Respondents in the instant case have relied, the Fifth Circuit indicated what the plaintiffs in that case should have alleged. The case involved discrimination, but not racial discrimination. The Court of Appeals said at p. 701:

> There was no allegation that an appeal (under the Union's Constitution) to the General Committee for the Seaboard Railroad as a whole would be handled by a hostile majority, much less than an appeal to the Internal Executive Committee, president, or directors, would be accorded any hostile treatment. Thus no reason was alleged and none, of course, shown on the motion for summary judgment why an appeal as provided for in the constitution would be nugatory for any reason of bad faith or any other improper motive.

Petitioners point out that in the instant case there was no motion for summary judgment and no proof whatsoever. Petitioners would have been glad for an opportunity to show bad faith on the part of The Brotherhood by actual evidence.

The very next case which the Fifth Circuit decided cited **Fingar** and was decided flatly in favor of Petitioners' position here. In **Calagas v. Calhoun**, 309 F. 2d 248 (5th Cir., 1962), the Fifth Circuit at pp. 259-260 said:

> The plaintiff, however, alleged in his complaint that action to obtain relief through union procedures would be "futile" because the individuals who were named as defendants and whose actions the plaintiff complains of, are officers of National and are in control of all channels of relief the plaintiff might have in the union. See **Fingar** . . . **The plaintiffs are not compelled to exhaust the internal remedies of their union when their appeal would have to be made to the very officers against whom their complaint is directed** (emphasis supplied).

This word "futile" was echoed in **Thompson v. New York Central**, *supra*.

From the allegations in the instant complaint it is obvious that Petitioners would continue to be discriminated against all the way up the line, **even if** there were practical internal remedies and **even if** Petitioners pursued these all the way to the top. To go all the way in the face of the initial intimidations faced by Petitioners would be the ultimate in **futility**.

Another case holding that an appeal through internal remedies would be a futility and unnecessary because the appeal would be to a body whose actions were challenged is **King v. Randazzo**, 234 F. Supp. 388 (E. D. N. Y. 1964), affirmed and modified on other grounds at 346 F. 2d 307 (2nd Cir., 1965).

In **Libutti v. Di Brizzi**, 337 F. 2d 216 (2nd Cir., 1964) (opinion adhered to on rehearing, 343 F. 2d 460), some language used by Chief Judge Lumbard sheds light on when the exhaustion of internal remedies is unnecessary. The **Libutti** case was decided under 29 U. S. C., § 411 (a) (4), which expressly gives a Union the right to require members to exhaust internal Union remedies before resorting to suit in the courts. Discrimination was not alleged

or discussed in the case. However, the constitution and by-laws provided eligibility requirements for election to office. The Union's Executive Board arbitrarily changed these requirements just before an election, and the court held that such a change violated the plaintiff's right to nominate a candidate, which right is guaranteed by L. M. R. D. A. As to the issue of the requirement that plaintiff must exhaust internal remedies, Judge Lumbard held such a requirement "void", and held that the general rule is not "absolute" under the common law, and said further at p. 219 of 337 F. 2d, that "among the traditional exceptions" to the general rule of exhaustion of remedies "is the situation in which the action complained of is void." Judge Lumbard further elucidated at p. 219:

> When conceded or easily determined facts **show a serious violation of the plaintiff's rights**, the reasons for requiring exhaustion are absent; the commitment of judicial resources is not great; the risk of misconstruing procedures unfamiliar to the court is slight; **a sufficient remedy given by the union tribunal would have to approximate that offered by the court.** Where, as in this case, conceded facts show a serious **violation of a fundamental right**, we hold that plaintiffs need not exhaust their union remedies (emphasis supplied).

Petitioners respectfully agree with this highly respected Judge. His reasoning, his logic, and his language seem to be peculiarly applicable in this case. The court in **Thompson v. New York Central**, *supra*, and other courts, apparently have thought so too.

An earlier and similar case decided where a union member was disciplined without a hearing and brought suit without exhausting internal remedies is **Detroy v. American Guild of Variety Artists**, *supra*, p. 11. The court made the following comments regarding the exhaustion of remedies in that case in holding that the rule, even under the statute, was not absolute, at p. 78 of 286 F. 2d:

The recent case of **Vaca v. Sipes**, 386 U. S. 171, 17 L. ed. 2d 842, 87 S. Ct. 903 (1967), recognizes that the courts are not completely divorced of the responsibility for curbing arbitrary and discriminatory Union and Company conduct. With regard to racial discrimination practiced by a Union against an employee, this Court in **Vaca** stated at 17 L. ed. 2d 853:

> This Court recognized in Steele [discussed, *infra*, at p. 26] that the congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination . . .
>
> . . .
>
> For these reasons, we cannot assume . . . that Congress . . . intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative.

With regard to the exhaustion of remedies under the bargaining contract, this Court in **Vaca** observed at 17 L. ed. 2d 854-855, that:

> . . . because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant.

If Respondents are ever forced to join issue on the question of the adequacy of the internal grievance machinery, Petitioners can prove as a fact that the Frisco and the Union have a bargaining contract which provides that no grievance whatsoever can be processed without the ap-

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p. 400; 24 Maryland L. Rev. 113 (1964), Herring, "The 'Fair Representation' Doctrine: An Effective Weapon Against Union Racial Discrimination?"

proval of the Local Committee of the Union. All grievances are completely controlled by the Union and the Company. Again the question: does a plaintiff in a Federal Court have to allege each minute detail of administrative inadequacy (the complaint could be longer than the collective bargaining agreement and the Union Constitution), in order to show a standing to complain, or is there some burden on defendants to challenge the standing by affirmative facts to show the adequacy of the extra-judicial remedies? If plaintiffs are to be denied their day-in-court under such circumstances, it appears apparent that, as a practical matter, the Union and the Frisco will be left perfectly free to practice racial discrimination against them, and at the same time will be left perfectly free to refuse fairly to process their grievances. As stated in **Vaca** at 17 L. ed. 2d 855:

> To leave the employee remediless in such circumstances, would, in our opinion, be a great injustice.

In further examining the circumstances under which an employee might obtain judicial relief without exhausting internal remedies to a fruitless end, this Court in **Vaca** stated at 17 L. ed. 2d 855:

> An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures. . . . In such a situation **(and there may of course be others)**, the employer is **estopped** by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action (emphasis supplied).

Petitioners alleged in their original complaint (Appendix p. 38) that there was a "tacit understanding" and "sub-rosa agreement" between the Frisco and the Union to practice racial discrimination against Petitioners; and Pe-

titioners further alleged in their amended complaint (Appendix p. 69) that when they attempted to process their grievances:

> they were treated with condescension by both Brotherhood and Company, sometimes laughed at and sometimes "cussed", but never taken seriously. When the white plaintiffs brought their plight to the attention of the Brotherhood, they got substantially the same treatment which the Negro plaintiffs received, except that they were called "nigger lovers" and were told that they were just inviting trouble. Both defendants attempted to intimidate plaintiffs Negro and white.

Under these circumstances and in the face of such allegations, the Company should be "estopped by its own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action." **Vaca v. Sipes**, *supra*. The Union should, likewise, because of its conduct be estopped to rely on such a defense. It is, in fact, totally incomprehensible how a Company and a Union acting in concert to practice racial discrimination could be allowed to rely on the technical defense of non-exhaustion of internal remedies. It is especially incomprehensible how a Company and a Union conducting themselves in such a manner could be allowed to rely on such a defense when they themselves negotiated the contract which places the processing of grievances within their complete and exclusive control.

This Court in **Vaca**, in addition to the theory of estoppel, pointed out still another situation in which the exhaustion of internal remedies to a complete and endless end is not a prerequisite to court action. This Court stated at 17 L. ed. 2d 855:

> We think that another situation when the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole

> power under the contract to invoke the higher stages of the grievance procedure, **AND if, as alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's WRONGFUL refusal to process the grievance** (Court's double emphasis) (single emphasis supplied).
>
> * * * * * * *
>
> Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements. Cf. Richardson v. Texas & N. O. R. R., 242 F. 2d 230, 235, 236 (C. A., 5th Cir.)[1]

As already pointed out, Petitioners in the instant action have clearly alleged facts showing that the Union and the Company "wrongfully" refused to give honest consideration to their grievance, and even laughed at them and intimidated them. In light of **Vaca** does the law deny to Petitioners the opportunity to prove their allegations and shield Unions and Companies from the natural consequences of their wrongful conduct in conspiring to practice racial discrimination? Petitioners submit not.

The Alabama law on the subject of exhaustion of contractual remedies is stated favorably to Petitioners in

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[1] The Second Circuit correctly applies **Vaca v. Sipes** in **Desrosiers v. American Cyanamid**, 377 F. 2d 864 (1967), where at p. 871 it says:

> Thus, as the record stood when the motion to dismiss and for summary judgment was granted . . . Desrosiers' claim of breach of duty of fair representation on the part of the Union and his further claim that his employer had acted in collusion with the Union to deny him his rights stood unimpeached and uncontradicted. The employer and the Union for the first time were both before the Court as defendants as Vaca v. Sipes indicated they should be. Desrosiers was entitled to prove his allegations . . . if he could; if proven they might well be sufficient to overcome the employer's defense of failure to exhaust contract grievance procedures.

Alabama Power Co. v. Haygood, 266 Ala. 194, 95 So. 2d 98 (1957).

The analysis of the National Railroad of Adjustment Board cases, *infra*, also may shed some light upon the constitutional requirement of "due process", as it is applied to the requirement of exhaustion of contractual and internal union remedies where they would be a mere formality and a futility. While the foregoing cases, except perhaps **Libutti**, did not deal directly with this constitutional question, always implied in the words "futility", "inadequate", "illusory", "uncertain", are a consideration of the rules of fair play inherent in the "due process" clause of the Constitution of the United States.

The National Railroad Adjustment Board:

Petitioners respectfully point out that in **Walker v. Southern R. Co.**, 385 U. S. 196, 17 L. ed. 2d 294, 87 S. Ct. 365 (1966), rehearing denied 385 U. S. 1020, 17 L. ed. 2d 559, 87 S. Ct. 699, cited by the Fifth Circuit in its opinion in this case, this Court recently refused to apply **Republic Steel v. Maddox** to agreements governed by the Railway Labor Act. Therefore, it would appear that only the real question here as to extra-judicial remedies may be whether petitioners must pursue their N. R. A. B. remedy and not whether they must exhaust all three possible extra-judicial remedies.

Milstead v. Atlantic Coast Line R. Co., 273 Ala. 557, 142 So. 2d 705 (1962), cert. denied 83 S. Ct. 189, 371 U. S. 892, 9 L. ed. 2d 124 (1962), commented upon favorably in 15 Ala. Law Review 626, Spring 1963, is the leading Alabama case on the subject of exclusive jurisdiction in the N. R. A. B. where Company-Union discrimination is alleged. The only real difference between the instant case and the **Milstead** case is that the collusive discrimination here is racial, whereas the discrimination

in that case was a matter of union politics. The Alabama Supreme Court held that the doors of a *nisi prius* court were open where claims of invidious discrimination were made. The same arguments advanced by Respondents in the District Court and the Court of Appeals were advanced in the **Milstead** case by the Union and the Company. Realizing that this Honorable Court may not feel bound by this latest Alabama decision on the jurisdictional question, Petitioners will explore the background of the problem, and the applicable federal cases.

Title 45, § 153, U. S. C. A. (part of the Railway Labor Act) is the statute which originally created the N. R. A. B. in 1934. The N. R. A. B. is divided into four divisions, each holding sway over a different classification of employees. The division which purportedly would have jurisdiction over this dispute consists of ten members, five of whom are selected and designated by the national railway labor organizations and five by the carriers. Each member of the board is compensated by the party which he "represents". The jurisdictional provision is as follows:

> (i) The disputes between an employee or group of employees and the carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning local rules or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes, but failing to reach an adjustment in this manner, the disputes may be referred . . . to the appropriate division of the Adjustment Board with the full statement of the facts and all supporting data bearing upon the disputes.

The first major case to be decided on the alleged exclusiveness of N. R. A. B. jurisdiction over employee-employer disputes involving the interpretation of collec-

tive bargaining agreements, was **Moore v. Illinois Central R. Co.**, 312 U. S. 630, 61 S. Ct. 754, 85 L. ed. 1089 (1941). The contention was there made by the Company that a discharged employee had failed to exhaust the administrative remedies provided by the Railway Labor Act. Mr. Justice Black, speaking for the Court, at page 1092 of 85 L. ed., said of the Act:

> But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court.

Thereafter there developed a line of cases which, it is argued, conflicts with the philosophy stated in the **Moore** case, although the new cases did not expressly overrule **Moore**. The leading case of this line was **Slocum v. Delaware L&W R. Co.**, 339 U. S. 239, 70 S. Ct. 577, 94 L. ed. 795 (1950). The basic holding of all of these **Slocum**-type cases is that a person still in the employ of a carrier, as distinguished from a person accepting a wrongful discharge and suing for damages as in the **Moore** case, must pursue the remedy provided him by the N. R. A. B., which has been called "a congressionally designated agency peculiarly competent in this field." See **Slocum**, *supra*, at page 800 of 94 L. ed.

Then came a counter-balancing trend, manifested in **Steele v. Louisville & Nashville R. Co.**, 323 U. S. 192, 65 S. Ct. 226, 89 L. ed. 173 (1944). In this case, a Negro fireman, represented by the Fireman's organization because of its majority status among his class of employees, sued both the Company and the Union to enjoin the enforcement of a new agreement which was allegedly discriminatory against him and others similarly situated. Steele did not attempt to take his grievance before the N. R. A. B., but rather sued in an Alabama *nisi prius* court. At page 181 of 89 L. Ed., this Court said:

But we think the Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority.

At page 185 of 89 L. ed., this Court continued as follows:

Section 3 First (i), which provides for reference to the Adjustment Board of "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements," makes no reference to disputes between employees and their representative. Even though the dispute between the railroad and the petitioner were to be heard by the Adjustment Board, the Board could not give the entire relief here sought. The Adjustment Board has consistently declined in more than four hundred cases to entertain grievance complaints by individual members of a craft represented by a labor organization. "The only way that an individual may prevail is by taking his cause to the Union and causing the Union to carry it through to the Board." Administrative Procedure in Government Agencies, S. Doc. No. 10, 77 Cong., 1st Sess,, Pt. 4, p. 7. Whether or not judicial power might be exerted to acquire the Adjustment Board to consider individual grievances, as to which we express no opinion, we cannot say that there is an administrative remedy available to petitioner or that resort to such proceedings in order to secure a possible administrative remedy, which is withheld or denied, is prerequisite to relief in equity. Further, since Section 3, First (c) permits the national labor organizations chosen by the majority of the crafts to "prescribe the rules under which the labor members

of the Adjustment Board shall be selected" and to "select such members and designate the occasion on which each member shall serve," the Negro fireman would be required to appear before a group which in large part is chosen by the respondents against whom their real complaint is made. In addition, Section 3, Second, provides that a carrier and a craft or crafts of employees, "all acting through their representatives, selected in accordance with the provisions of this Act," may agree to the establishment of a Regional Board of Adjustment for the purpose of adjusting disputes of the type which may be brought before the Adjustment Board. In this way, the carrier and the representative against whom the Negro firemen have complained have power to supersede entirely the Adjustment Board's procedure and to create a tribunal of their own selection to interpret and apply the agreements now complained of to which they are the only parties. **We cannot say that a hearing, if available before either of these tribunals, would constitute an adequate administrative remedy** (emphasis supplied).

[Parenthetically, this reasoning would apply equally to illusory internal administrative remedies controlled by the Company or the Union.] In the **Steele** case, the Supreme Court went on to hold that the *nisi prius* court had original jurisdiction under the circumstances.

Further enlightenment came from Mr. Justice Frankfurter's concurring opinion in **Pennsylvania R. Co. v. Rychlick**, 353 U. S. 480, 77 S. Ct. 421, 1 L. ed. 2d 480 (1957). Mr. Justice Frankfurter admitted the "exclusion of the courts from this process of collaborative self-government" involved in N. R. A. B. proceedings, consistent with the **Slocum** rationale, but then said:

> There is one qualification to the principle I have stated, or rather there is a counter-principle to be

respected. This is the doctrine established by Steele v. Louisville & N. R. Co., 323 U. S. 192, 89 L. ed. 173, 65 S. Ct. 226. The short of it is that since every railroad employee is represented by Union agents who sit on a System Board of Adjustment, such representatives are in what amounts to a fiduciary position: they must not exercise their power in an arbitrary way against some minority interest. . . . the bargaining representatives owe a judicially enforceable duty of fairness to all of the components of the working force when a specific claim is in controversy.

Also extending the **Steele** case was the case of **Mount v. Grand International Brotherhood of Locomotive Engineers**, 226 F. 2d 604 (6th Cir. 1955), cert. den., 350 U. S. 967, 76 S. Ct. 436, 100 L. ed. 839 (1956). Mount was an employee who sued to enjoin his Brotherhood from negotiating a seniority agreement that he alleged was "unfair, arbitrary and an unlawful act of favoritism." He had not bothered himself in the morass of internal procedures provided by the Union constitution. Applying the **Steele** case, the Sixth Circuit held at page 607 of 226 F. 2d as follows:

> We are of the opinion that if the Brotherhood is engaged in hostile discrimination against a portion of the membership of the craft, without a good faith representation of the entire membership of the craft, in making contracts with the employer, the employee so affected has a cause of action . . .

The Sixth Circuit was here saying that where a railroad Union discriminates against its own members, the members can immediately turn to the courts for relief against the prejudicial treatment and need not go to the N. R. A. B., or anywhere, else as a prerequisite. It is noted that this Court refused to review the **Mount** decision.

Then in 1957 this Honorable Court, in one of its unanimous decisions, decided **Conley v. Gibson**, 355 U. S. 41.

78 S. Ct. 99, 2 L. ed. 2d 80 (1957). In that case, Negro railroad employees sued their Brotherhood for a declaratory judgment, an injunction, and damages for failing to represent them fairly in circumstances where the railroad had abolished jobs and given them to white employees, the true intention of the Brotherhood being to violate the rightful seniority status of the plaintiffs as provided by the pre-existing contract. The District Court had dismissed the suit on the ground that the jurisdiction of the N. R. A. B. was exclusive, and the Fifth Circuit had affirmed. The Supreme Court reversed the Fifth Circuit and held that the Railway Labor Act did not give the N. R. A. B. exclusive jurisdiction over the controversy. More particularly at page 84 of 2 L. ed. 2d, this Court said:

> The Adjustment Board has no power under Section 3 First (i) or any other provision of the Act to protect them from such discrimination.

At page 85 of 2 L. ed. 2d, the Court made the following statement, peculiarly applicable to the situation here presented:

> The bargaining representative's duty not to draw "irrelevant and invidious" distinctions among those he represents does not come to an abrupt end as the respondents seem to contend with the making of an agreement between the union and the employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements and the protection of employee rights already secured by the contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. The contract may be fair and impartial on its face yet it administers in such a way with the active

> or **tacit consent of the Union**, as to be flagrantly discriminatory between some members of the bargaining unit (emphasis supplied).

Respondents in the instant case advanced the idea before the Court of Appeals that the **Steele** case is limited to circumstances where collective bargaining agreements are discriminatory in the first place, or when the agreements are themselves unlawful in terms or effect, and is not applicable when the contract is being relied on as valid but being discriminatorily applied. The case which once stood for this proposition is **Hayes v. Union Pacific R. Co.**, 184 F. 2d 337 (9th Cir., 1950), which held, at page 338 of 184 F. 2d, as follows:

> It is only when collective bargaining agreements are unlawfully entered into or when the agreements themselves are unlawful in terms or effect that federal courts may act.

This Court in **Conley**, *supra*, in footnote No. 4, at page 84 of 2 L. ed. 2d, clearly overruled the **Hayes** case as follows:

> The courts below also relied on **Hayes v. Union Pacific R. Co.** (CA 9th, Cal., 184 F. 2d 337, cert. den., 340 U. S. 942, 95 L. ed. 680, 71 S. Ct. 506), **but for the reasons set forth in the context we believe that case was decided incorrectly** (emphasis supplied).

Nothing could be clearer.

Also contrary to **Hayes**, the Fifth Circuit in **Richardson v. Texas and New Orleans Railroad Co.**, 242 F. 2d 230 (C. A. 5th, 1957) (a case based on racial discrimination seeking damages for Negroes who had not been discharged, and cited with approval by this Court in **Vaca v. Sipes**, *supra*), totally rejected this type of argument and reversed the lower court which had held that the N. R. A. B. had exclusive jurisdiction. The Fifth Circuit in **Richardson** stated at p. 234:

> While it is true that Section Five of the bargaining agreement, read in isolation and out of context from other portions of the complaint, is not discriminatory upon its face, the surrounding provable facts and circumstances make it discriminatory.

And further at p. 235:

> . . . our re-examination of the jurisdictional issue convinces us that the **absence** of any **allegation** as to the existence of a bargaining agreement discriminatory upon its face is not determinative, and does not foreclose judicial inquiry where the complaint seeks redress for discriminatory representation in violation of the bargaining union's implied statutory obligation to bargain impartially for all . . . (emphasis supplied).

It is impossible to square the Fifth Circuit's **Richardson** decision with the Fifth Circuit's opinion of December 5, 1967 in this case. It appears from the **Richardson** case that even if there were no allegations in a complaint that a written bargaining contract was *per se* racially discriminatory, the courts would not be ousted of jurisdiction when the circumstances in effect show that racial discrimination is, in fact, being practiced. In the instant case, Petitioners have alleged that a "tacit understanding" and "subrosa agreement" exists between the Frisco and the Union to discriminate against them. Petitioners seek damages and injunctive relief under such **unwritten** contract and for such discrimination; they do not seek, need, or require the interpretation of the written collective bargaining contract. Under the rationale of the **Richardson** case, judicial inquiry is not foreclosed to them where they seek "redress for discriminatory representation."

As to the Frisco, both the **Vaca** and **Richardson** cases, point out that Congress did not intend to shield employers from wrongful Union conduct in which the employer has

participated and joined. In **Richardson**, *supra*, at 236 of 242 F. 2d, the Fifth Circuit held:

> It takes two parties to reach an agreement, and both have a legal obligation **not to make or enforce an agreement or discriminatory employment practice** which they either know, or should know, is unlawful. (emphasis supplied.)
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> • • •
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> The Railroad may not have been the Brotherhood's keeper for bargaining purposes, but we think that, under the allegations of this complaint, it can be required to respond in damages for breach of its own duty not to join in causing or perpetuating a violation of the Act and that policy which it is supposed to effectuate.

When **Hayes** was overruled by this Court in **Conley**, and when the **Richardson** case, decided by the Fifth Circuit, was cited with approval by this Court in **Vaca**, it is difficult to comprehend how it can longer be disputed that the Federal Courts have jurisdiction to redress racially discriminatory treatment of employees by Company and Union.

After **Conley**, logically followed **Choate v. Grand International Brotherhood of Locomotive Engineers**, 159 Tex. 1, 314 S. W. 2d 795 (1958), which correctly applied **Steele** and **Conley** and held that the mere fact that the Company is a co-party-defendant and that the meaning of the contract is involved does not oust the *nisi prius* court of jurisdiction. To like effect is **Cunningham v. Erie R. R. Co.**, 266 F. 2d 411 (2nd Cir. 1959), where the Second Circuit held as follows:

> If the District Court has jurisdiction to proceed against the Union, it is clear, we think, that it has also power to adjudicate the claim against the railroad. It would be absurd to require this closely integrated dispute to be cut up into segments.

The Fifth Circuit in 1962 (as in **Richardson** completely inconsistent with its opinion in the instant case), applied **Conley** in **Brotherhood of Railroad Trainmen v. Central of Ga. Ry. Co.**, 305 F. 2d 605 (5th Cir., 1962), and flatly disagreed with the contention that N. R. A. B. jurisdiction was exclusive over a controversy between employee and company where there were grounds alleged to take it away from the N. R. A. B. That Court at p. 607 of 305 F. 2d said:

> • • • the relief to be accorded may not be any less than reasonably required though it might mean that Byington, in a personal way, might reap some of the benefit of the judicial decree and thereby obtain indirectly some of the benefits we hold he may not secure directly.
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> Considering that a complaint must be read in the light of the principles recently restated in **Conley v. Gibson**, 1957, 355 U. S. 41, 78 S. Ct. 99, 2 L. ed. 2d 80, and so often reiterated by us almost to the point of despair, we think that a direct, positive charge is made that the purpose of the Railroad in the ostensible disciplinary investigative proceeding is to thwart Byington's (and the Brotherhood's) effectiveness as a collective bargaining agent for the Trainmen. Whether this can be established by evidence is quite a different thing. But at this stage, on the pleadings only, and in advance even of evidence brought forward in receivable form on motion for summary judgment to establish that there is in fact no genuine controversy over the fact, the Trial Court could not determine the fact to be otherwise.

See, also, **Hosteller v. Brotherhood of Railroad Trainmen**, 287 F. 2d 457 (4th Cir., 1961), where the Fourth Circuit found the doors of the court open where discrimination by the bargaining agent was alleged.

It is interesting that the most recently decided cases, like **Thompson v. New York Central,** *supra*, p. 12, decided on January 28, 1966, where railroad employees have complained against both Union and Company, the defendants have not even argued preclusive jurisdiction in the N. R. A. B. In deciding why there is no longer much argument, it may be fruitful to comment in more detail upon the N. R. A. B. as the tribunal proposed by Respondents for the hearing of this complaint. There are four points that perhaps need to be discussed on this subject.

Point No. 1.

In the first place, the N. R. A. B. has absolutely no jurisdiction, either express or implied, to redress any wrong or to correct any discrimination perpetrated by a Union against an Employee either by the Union itself or in concert with the Company. As already quoted from the **Steele** case, at page 185 of 89 L. ed., this Court said:

> Section 3, First (i), which provides for reference to the Adjustment Board of "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements," makes no reference to disputes between employees and their representative. Even though the dispute between the railroad and the petitioner were to be heard by the Adjustment Board, the Board could not give the entire relief here sought.

Also already quoted from the **Conley** case, at page 84 of 2 L. 2d:

> The Adjustment Board has no power under Section 3, First (i) or any provision of the Act to protect them from such discrimination.

Repeating this holding from the **Conley** case, the Supreme Court of Texas, in the **Choate** case, at page 798 of 314 S. W. 2d, said:

It will be noted that the Act refers only to "disputes between an employee or group of employees and the carrier or carriers." Controversies between railroad employees and their union are thus not included in the jurisdiction granted thereby.[1]

Point No. 2.

In the second place, even if the N. R. A. B. had jurisdiction to grant all of the relief requested in the instant case, it is predictable with 100% accuracy that the N. R. A. B. would not decide this case in favor of lone employees when their grievance is against **both the Union and the Company.** The tribunal is "stacked" by definition.

In addition to what the **Steele** case says on this point, Mr. David Levinson, associate professor of economics at Ohio University, in his article "Legal Aspects of the National Railroad Adjustment Board," at 4 LABOR LAW JOURNAL 685 (1953), at page 692, sheds considerable light on N. R. A. B. procedures, as follows:[2]

> If the griever individually processes his claim at the carrier level and then attempts to proceed in the same manner before the Board, it might be contended that the Board's refusal to hear his claim is based precisely upon the fact that it is not submitted in accordance with the law, for the R. L. A. specifies that disputes at the carrier level "shall be handled in the usual manner . . ." (R. L. A., See Sec. 3 First (i)). Presumably it is the union which handles the case when it is done in the usual manner. But in accord-

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[1] See also, **Kroner, Minor Disputes Under the Railway Labor Act: A Critical Appraisal,** 37 N. Y. U. L. Rev. 41 (1962) at 47-48.

[2] See also, Id. at 48; **Summers, Individual Rights in Collective Agreements and Arbitration,** 37 N. Y. U. L. Rev. 362 (1962) at 388, note 124.

ance with statutory construction, the various components of the law, if it is feasible to do so, should be integrated, rather than antagonized. Aside from the contrary implications of the Supreme Court's opinion in the above mentioned **Elgin** case, if this contention holds, it follows that the griever's right to individually present his case to the Board (R. L. A., Sec. 3, First (j)) is of no account. The term **usual manner** must refer to the usual steps in the grievance procedure rather than to the usual party that processes the grievance.

The kind of justice the griever may expect from a Board in which the carrier members presumably are aligned with the party adversary to his grievance, and in which the labor members resent the imposition of his case upon them through court order, is a matter for speculation. The labor members might be constrained to act judiciously if decisions of the Board were to have any precedent, but that matter in itself appears to be one of controversy and bafflement. Following the general rule concerning prejudice in administrative bodies, it might be suggested that such prejudice does not disqualify the Board since its orders are not self-executory—that is, an opportunity is afforded for court review in an enforcement proceeding (R. L. A., Sec. 3, First (p)). But such proceedings may be initiated only by the beneficiary of a Board award (or his agent), as is discussed below. The employee in question could not be so designated because the Board presumably would deny rather than sustain his claim. If judicial relief from the Board's prejudice is available to the employee, it is probably based upon the allegation of violation of due process (emphasis supplied).

Mr. Lloyd K. Garrison, Dean of Wisconsin Law School and referee in more than one hundred early cases decided

by the N. R. A. B. where the Union and Company members were deadlocked, in his article, "The National Railroad Adjustment Board — A Unique Administrative Agency" 46 YALE LAW JOURNAL 567 (1937) discussed the background and functions of the N. R. A. B. during its first years of operation. At page 577 of 46 YALE LAW JOURNAL, in discussing procedures, Mr. Garrison said:

> The claim will normally be taken up by the local chairman of the **union** with the appropriate local railroad official . . . The **union** serves written notice on the appropriate division of the Board (emphasis supplied).

It is obvious that the historic function of the N. R. A. B. has been to decide conflicts between the **Companies** and the **Unions.** The grievants have always been either Companies or Unions, not individuals, particularly not individuals discriminated against by both Company and Union. The rationale of the **Slocum** case, which found that the N. R. A. B. was an "agency peculiarly competent in this field," breaks down when an attempt is made to apply it to cases like the instant case. The Supreme Court in the **Steele** case, at page 185 of 89 L. Ed., cited, as illustrative of the inadequacy of the administrative remedy provided by the N. R. A. B., the case of **Tumey v. Ohio,** 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 50 A. L. R. 1243 (1927). That case was one which held that an accused is unconstitutionally deprived of due process of law if subjected to the judgment of a court the judge of which has a direct and substantial pecuniary interest in reaching a conclusion against him. In the instant case, five of the would-be "judges" receive their remuneration from carriers. Five of the would-be "judges" receive their remuneration from unions. From the history of the N. R. A. B., it is obvious that in order to keep their jobs these "judges" must in all cases decide in favor of the position taken by the parties they "represent." Section 153 (g) of the Railway

Labor Act says: "Each member of the Adjustment Board shall be compensated by the party or parties he is to **represent**" (emphasis supplied). The fact that a grievant theoretically can pursue his administrative remedy alone even when not represented by his Union is no real help. Hand-in-glove cooperation between Union and Company means that plaintiffs' chances would be nil if they sought to pursue this alleged "administrative remedy." The N. R. A. B. would have available any one of a dozen technicalities, any one of which it might seize (or it might not give a reason at all), and after five years of delay, Petitioners would not be as far along as they are right now.

Point No. 3.

In the third place, a judicial review, if any, of a decision of the N. R. A. B. adverse to an individual claimant is so limited (if it exists at all) as to make even more conclusive Petitioners' contention here of a lack of the constitutionally required "due process" under the instant circumstances. Mr. David Levinson has already made the point in the quotation above, *supra*. Again, at page 696 of 4 LABOR LAW JOURNAL he outlines the case law as follows:

> . . . numerous cases are reported in which an employee who was **denied** his claim by the Board has turned to the courts to upset that award or has sought to litigate—in a claim for damages, for example—the same question which the Board has entertained in denying him his claim. Although there are some lower court decisions to the contrary, **the overwhelming weight of court opinion holds to the denial of relief on the ground that the Board's award is final and binding** (emphasis supplied).

In **Coats v. St. Louis-San Francisco Railway Co.**, 230 F. 2d 798 (5th Cir., 1956), the Fifth Circuit agreed with the

argument well and vigorously made by present counsel for the Frisco that the finding of the N. R. A. B. was final and binding on an employee AND NOT REVIEWABLE. This holding in the **Coats** case is no more than a preview of what Mr. Justice Frankfurter again said in the **Rychlick** case, *supra*, p. 28, at page 491 of 1 L. Ed. 2d, where he nailed it down for all time.

> The determination of the System Board [an elective substitute for the N. R. A. B.] on the merits is not open to judicial review, even on so-called legal questions. It is not for a court to say that a complaint against the System Board must fail because the System Board rightly held against the complaint. Right or wrong, a court has no jurisdiction to review what the System Board did, unless a complaint asserts arbitrariness and seeks to enforce the limited protection established in the **Steele** case (emphasis supplied).

It is certainly understandable why Respondents in the instant case want to hurry Petitioners off to Chicago (the home of the N. R. A. B.) by making the innocent-eyed assertion that Petitioners must "exhaust their administrative remedies". It would be laughable for Petitioners to go to Chicago at considerable expense and great expenditure of time, knowing in advance that this administrative tribunal, as it was historically conceived, as it is actually constituted, and as it has in fact functioned, will turn them down as surely as night follows day, and that they will then have reached the end of the road, a blind alley. If they are forced to take their lumps before the N. R. A. B. after a long and frustrating wait, and they should thereafter attempt to come again to the lower court, they would undoubtedly be faced with the proposition, inconsistent with that now inferentially presented by Respondents that the N. R. A. B. not only acted within its exclusive pre-

rogative, but that its decision is final, binding, and not reviewable.

This dilemma of a prejudiced tribunal without adequate judicial review was commented on by the Court of Appeals for the Second Circuit in the **Rychlick** case, 229 Fed. 2d 171, on its way to the Supreme Court. That Court held that the System Board (an elective substitute for the N. R. A. B. under the Railway Labor Act, having identical jurisdiction) had exclusive jurisdiction to determine whether a union attempting to obtain representation on the Board was "national in scope" and therefore entitled to representation, even though the petitioning union was not represented on the Board at the time the petitioner was, in effect, trying to unseat one of the Board members already seated and actively representing a rival union. The basis for its decision that such a procedure was not a *per se* unconstitutional denial of due process was its perhaps erroneous conclusion that there must be some kind of implied judicial review. At page 175 of 229 Fed. 2d, the Court said about the alleged absence of judicial review:

> Nothing could more completely defeat the most elementary requirement of fair play . . . especially when we remember that the union members of the "System Board" are likely to be persons of consequence in the union itself.

It will be remembered that Mr. Justice Frankfurter later in this same case, on its appeal to this Court, said that there was no judicial review. This simply echoes that without adequate judicial review a forced appearance before a prejudiced tribunal defeats the most elementary requirement of fair play and violates due process and the equal protection of the law.

In **Pennsylvania Railroad Co. v. Day**, 360 U. S. 548, 79 S. Ct. 1322, 3 L. Ed. 2d 1422 (1959), this Honorable Court

continuing the line of cases beginning with **Slocum**, held that the N. R. A. B. had exclusive primary jurisdiction of an employee's claim for back pay even after he had retired. The case did not involve a charge of mistreatment by the Union or by the Company but only sought an interpretation of the collective bargaining agreement. Three Justices disagreed with the majority and said that the area of exclusive jurisdiction of the N. R. A. B. should be constricted rather than expanded. Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Douglas, based their dissent in part upon their feeling that the absence of judicial review of a denial by the N. R. A. B. of an employee's claim, whereas an N. R. A. B. decision in favor of a railroad can be tried *de novo*, amounts to a denial of the constitutional requirement of equal protection. At page 1429, et seq., of 3 L. ed. 2d, Mr. Justice Black, speaking for the minority, says as follows (almost paraphrasing Mr. David Levinson as quoted, *supra*):

> But if external considerations are to be used to interpret the statute, I think that the "lopsided" effect courts have given to the Act's provisions for review of Board awards furnishes a very weighty reason for excluding retired employees from the exclusive jurisdiction of the Board. The Act provides that either a railroad worker or an employee can invoke the compulsory jurisdiction of the Adjustment Board. Section 3, First (m) states that "awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money 'award.'" As construed, this provision prohibits an employee from seeking review of an adverse Board ruling in the courts. And courts, determining that a Board denial of an employee's money claim is not a "money award" falling within the exception of Section 3, First (m), have refused workers a judicial trial of their money claims against the railway after these have been re-

jected by the Board. Today's decision in Union Pacific R. Co. v. Price, 360 U. S. 601, 3 L. Ed. 2d 1460, 70 S. Ct. 1351, appears to adopt this position. In contrast, however, a railroad may obtain a trial substantially de novo of any award adverse to it. For, under Section 3, First (p) of the Act, if a carrier does not voluntarily comply with the Board's award, including wage awards for money damages, a wage earner can enforce the Board's order only by bringing, in a United States District Court, a suit which "shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the adjustment Board shall be prima facie evidence of the facts therein stated . . .

Construed this way, the Act creates a glaring inequality of treatment between workers and railroads. After denial by the Adjustment Board workers can get no judicial trial of their claims; railroads, however, can get precisely the same kind of trial they would have were there no Adjustment Board, except that the Board's findings constitute prima facie evidence in the case. For the reasons stated by Mr. Justice Douglas in his dissent in Price, I think the Railway Labor Act should be construed to grant a railroad employee the same kind of redetermination by judge and jury of a Board order denying him a "money award" that the Act affords a railroad for a money award against it. The Court rejected this view in Price. The unfairness of the discriminatory procedure there upheld seems manifest to me. In my judgment, it is bound to incite the kind of bitter resentment among railroad workers which will produce discord and strikes interrupting the free flow of commerce and creating the very evil Congress sought to avoid by this Act. These reasons seem to me to provide compelling arguments against judicial expansion of

the Act to retired railroad workers plainly not covered by its language.

If this Court still holds to the view that there is no judicial review of an N. R. A. B. decision adverse to an employee, it would suggest that this Court (which was unanimous in **Conley**) would go along with the reasoning of Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Warren in **Pennsylvania v. Day**, *supra*, to allow a direct submission of the subject matter of the instant complaint to a court of law under the line of cases beginning with **Steele** and culminating in **Conley**. A perfect rationale is readily available to this Court without doing violence to one of its prior decisions. This Court should not say of the instant case (to use the language of **Slocum**), that the N. R. A. B. is a tribunal "peculiarly competent" to hear a case where both the Railroad and the Brotherhood are accused of discriminatory treatment of the claimant. Avoiding this notion of special expertise in the statutory tribunal, Mr. Michael I. Sovern in 62 **Columbia L. Rev.** 563 (1962), "The National Labor Relations Act and Racial Discrimination", at p. 611, says:

> In fact, **the duty of fair representation has so far been enforced almost exclusively by the courts and they must remain in the field to deal with cases arising under the Railway Labor Act** . . . (emphasis supplied).

Perhaps the "pros" and "cons" of exclusive N. R. A. B. jurisdiction is best summarized by a quotation from Mr. Lloyd K. Garrison, at 46 YALE LAW JOURNAL 598:

> Those trained in the law may be shocked by the very idea of a quasi-judicial tribunal deciding rights upon a hearsay record without witnesses. They may be equally disturbed by some of the procedures and **particularly by the absence of judicial review.** Yet it is difficult to conceive of the Board's being able to

> discharge its functions under any set up which would fit within their traditional legal concepts. Yet the Board's functions are essential ones and the point is that they are not exclusively, and perhaps not primarily, functions of dispensing justice in the orthodox sense, for in the broadest view the Board is an instrument for making collective bargaining agreements work and survive (emphasis supplied).

When Mr. Garrison wrote this, he was assuming that the actual protagonists before the Board would invariably be, as he had witnessed, the Carrier on the one hand and the Union on the other. In cases that do not fit such a mold the "shock" he spoke of is so great as to be tantamount to a lack of due process.

Point No. 4.

Fourthly, in recent years, not only has there been an evolution in the direction of judicial relief where administration relief is wholly inadequate because of charges of invidious discrimination, but there have been major investigations by Congressional committees into labor-management collusion and conspiracy, resulting in the enactment of the Labor-Management Reporting and Disclosure Act. In addition, there has been the recent enactment of the Civil Rights Act of 1964, although not specifically invoked by Petitioners. Altogether, there has now been firmly fixed a new body of public policy condemning invidious discrimination against an employee, particularly where his claim is arbitrarily not being pressed by his own Union. The nation is tired of the hideous practice of Union and Company "getting together" at the expense of certain employees not in the favored status. This growing public policy both explains and adds to the weight of the decisions moving away from an exclusive prerogative in the N. R. A. B. in cases where the Union is joining in a pattern of discrimination against the employee.

Reflecting this mood, writers Mr. Benjamin Aaron and Mr. Michael I. Komaroff in "Statutory Regulation of Internal Union Affairs-I", 44 Ill. L. Rev. 425 (1949), at pp. 431 and 437 condemn the practice of many railroad unions, including the Brotherhood of Railway Carmen of America, to limit the union participation of Negroes to "Jim Crow" auxiliary bodies [true here]; at p. 433 condemn the fact that Negroes are denied the privilege of participating in the administration of the N. R. A. B. because few or no unions with a predominately Negro membership have been found to be "national in scope"; and at p. 463 in general criticize the entire Railway Labor Act because:

> . . . the fact remains that it has been administered in such a way as frequently to defeat the principles of self-determination of representatives and of collective bargaining. As a result, large numbers of Negro workers have been deprived of democratic privileges and of valuable job rights accumulated over the years.

RECAPITULATION.

There are basically five reasons why a writ of certiorari should here be granted by this Honorable Court:

A. The reliance by the Court of Appeals for the Fifth Circuit on **Republic Steel v. Maddox**, *supra*, p. 12, indicates a mischievous tendency by the lower federal and state courts to interpret **Maddox** too broadly and to apply it indiscriminately even to cases where the grievance machinery is ineffectual because of hostility both of Union and Company. This tendency to misinterpret **Maddox** should not be allowed to reach full flower.

B. The full implication of **Conley v. Gibson**, *supra*, p. 29, has not been comprehended by some of the lower courts. There is still conflict and confusion among the Circuits as to the exclusivity of the N. R. A. B. procedure where Union and Company are working together to perpetuate or to perpetrate invidious discrimination. One example of this con-

flict, among many, is **Howard v. St. Louis-San Francisco Railway Company**, 361 F. 2d 905 (8th Cir. 1966) (relied upon by the Fifth Circuit here), which does not square with the reasoning of the Fifth Circuit in **Richardson v. Texas & New Orleans Railroad Company**, *supra*, p. 31, and **Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.**, *supra*, p. 34. Another example is the complete dissimilarity between the Fifth Circuit's opinion in this case and the Second Circuit's opinion in Desrosiers, *supra*, p. 23.

C. The national scope of the problem of racial discrimination in employment and particularly in seniority and promotion practices requires a larger measure of judicial responsibility than some courts apparently are willing to give. Courts of first impression must be made to realize that for a Negro to be blithely told to invoke his Union Constitution and to struggle through Company grievance procedures and to go to the N. R. A. B. (all without free legal counsel, as would be available under the N. L. R. B., and all in face of overt opposition from his own Union and Company) is not a legitimately required exhaustion of administrative remedies, rather a denial of "due process".

D. The lower courts urgently need a clarifying Supreme Court opinion as to the burden which must be carried by employee, Union and Company, on the question of the alleged **futility** in an attempted exhaustion of administrative remedies under circumstances where there the employee alleges cooperative Union-Company hostility and discrimination. The implication in the opinions rendered in this case thus far is that if there is any excuse for failing to exhaust all possible non-judicial remedies, the employee must set out in his complaint the entire Union Constitution and By-Laws and the entire Collective Bargaining Agreement, and must point specifically to their deficiencies under his particular circumstances. Other decisions.

here discussed, indicate that there is a responsibility for pleading and proof also on the Union and the Company. This problem calls for immediate attention from the Supreme Court, so that there will be a well understood guideline for the future on where this burden lies and whether it is a burden of pleading or of pleading **and** proof.

E. One question left unanswered by the courts below and upon which there has been a confusion of pronouncement, or an absence of pronouncement, is the question of which alleged administrative remedy must be pursued first if, as the Fifth Circuit says here, they must all be pursued. To add to the confusion, one administrative tribunal might reason that the exhaustion of another administrative remedy is a prerequisite to its administrative consideration of the claim. Double and triple non-judicial remedies, invoked under circumstances of hostility, will surely stifle claims of Union-Company discrimination if this Court concludes that this type of claim needs a strongly inhibiting influence. The District Court's opinion, adopted by the Court of Appeals, would suggest this feeling by those courts. Both the District Court and the Court of Appeals very casually dismissed petitioner's complaint. Their opinions provided little illumination except of their attitude toward this kind of litigation.

CONCLUSION.

In deciding the jurisdictional question, raised without affidavits on respondents' motions to dismiss, respondents granted for the sake of the argument that they are guilty of an "under-the-table" scheme of racial discrimination in their promotion practices. Yet they call themselves competent to decide petitioners' grievance. They are saying that Petitioners must suffer years of frustration inside the Union hierarchy seeking to obtain relief; and that **before, while or after** unsuccessful within the Union, they must also process their grievance with the Company without Union help; and that **before, while** or **after** unsuccessful

with the highest officer of the Company, they must go to Chicago and watch the N. R. A. B. preside over the burial of their claim, from which there is no resurrection. Any aggrieved employee in a free country, particularly when his grievance is based on racial discrimination, deserves better than this.

This case presents a peculiar instance of interracial cooperation by necessity. The futility and frustration felt by Petitioners, whether Negro or white, is the same. If the word "futile," as used in the decided cases, is to have any meaning or applicability, it must be applied in this case. The lower courts refused to equate "unavailability" and "inadequacy" under any circumstances, and have flatly said that to open the doors of the court to petitioners would "**sterilize procedures adopted to promote industrial peace**" (Appendix p. 66). Petitioners respectfully submit that these procedures were already sterile under the circumstances here alleged, and that Petitioners are not responsible for their sterility.

For the reasons given, Petitioners respectfully pray that a Writ of Certiorari be issued to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

WILLIAM M. ACKER, JR.,

LYNN G. BALDWIN,

CARL ISAACS,
Attorneys for Petitioners.

Of Counsel:

SMYER, WHITE, REID & ACKER,
600 Title Building,
Birmingham, Alabama 35203.

Certificate of Service.

I, William M. Acker, Jr., one of attorneys-of-record for petitioners, hereby certify that I have mailed a copy of the foregoing petition to Messrs. Cabaniss, Johnston, Gardner & Clark, First National Building, Birmingham, Alabama 35203, and to Messrs. Cooper, Mitch & Crawford, Bank for Savings Building, Birmingham, Alabama, 35203, attorneys-of-record for all respondents, by U. S. Mail, postage prepaid, this 2nd day of March, 1968.

.....

William M. Acker, Jr.

OPINION.

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 24288

JAMES G. GLOVER, ET AL.,

Appellants,

versus

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ET AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

(December 5, 1967.)

Before RIVES, GOLDBERG and DYER, Circuit Judges.

PER CURIAM: We agree with the opinion and decision of the district court. In addition to the authorities there cited, see *Republic Steel Corporation v. Maddox*, 1965, 379 U.S. 650; *Walker v. Southern Railway Co.*, 1966, 385 U.S. 196, *Vaca v. Sipes*, 1967, 386 U.S. 171; *Steen v. Local Union No. 163*, 6 Cir. 1967, 373 F.2d 519; *Howard v. St. Louis-San Francisco Railway Co.*, 8 Cir. 1966, 361 F.2d 905. The judgment is

AFFIRMED.

JUDGMENT.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1967

No. 24288

D. C. Docket No. CA 65-477

JAMES G. GLOVER, ET AL.,
Appellants,

versus

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ET AL.,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

Before RIVES, GOLDBERG and DYER, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, James G. Glover, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

December 5, 1967.

Issued as Mandate: Dec. 27, 1967.

PRINTED RECORD.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 24,288

JAMES G. GLOVER, ET AL.,
Appellants,

versus

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ET AL.,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

COMPLAINT.

Filed Jul. 13, 1965.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION.

Civil Case No. CA 65-477.

JAMES G. GLOVER, JAMES C. DENT, WILLIAM H. GREENE, JR., PAUL CAIN, ODELL BARMORE, CAREY GOODEN, MATTHEW C. PAYNE, JOHN E. JEFFRIES, ALBERT L. BOYD, BUSTER WRIGHT, VINCENT P. PIAZZA, JIMMIE O. WILEY, HOWARD D. KEPLINGER, JR., and SAM J. GUGLIOTTA,

Plaintiffs,

versus

ST. LOUIS-SAN FRANCISCO RAILROAD COMPANY, a Corporation, and BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, an unincorporated association,

Defendants.

Come now James G. Glover, James C. Dent, William H. Greene, Jr., Paul Cain, Odell Barmore, Carey Gooden, Matthew C. Payne, John E. Jeffries, Albert L. Boyd, Buster Wright, Vincent P. Piazza, Jimmie O. Wiley, Howard D. Keplinger, Jr., and Sam J. Gugliotta, and invoke the jurisdiction of this Honorable Court because of the diversity of citizenship of the parties, because there is a federal question involved, and because of the amount of damages claimed, as will hereinafter more fully appear.

Plaintiffs respectfully show unto the Court the following facts, viz.:

1. Plaintiff James G. Glover is a resident citizen of the State of Alabama, his residence address being 616—11th Court, West, Birmingham, Alabama. Plaintiff James C. Dent is a resident citizen of the State of Alabama, his residence address being 328—10th Avenue, S. W., Birmingham, Alabama. Plaintiff William H. Greene, Jr., is a resident citizen of the State of Alabama, his residence address being 1202 North Cahaba Street, Birmingham, Alabama. Plaintiff Paul Cain is a resident citizen of the State of Alabama, his residence address being 312 Miles Avenue, Birmingham, Alabama. Plaintiff Odell Barmore is a resident citizen of the State of New York, his residence address being "O" Lee Place, Freeport, Long Island, New York. Plaintiff Carey Gooden is a resident citizen of the State of Alabama, his residence address being 4429—45th Avenue, North, Birmingham, Alabama. Plaintiff Matthew C. Payne is a resident citizen of the State of Alabama, his residence address being 520 Mildren Avenue, Birmingham, Alabama. Plaintiff John E. Jeffries is a resident citizen of the State of Alabama, his residence address being 809 Center Place, S. W., Birmingham, Alabama. Plaintiff Albert L. Boyd is a resident citizen of the State of Alabama, his residence address being 1315 Hudson Avenue, Bessemer, Alabama. Plaintiff Buster Wright is a resident citizen of the State of Alabama, his residence address being Route 2, Millport, Alabama. Plaintiff Vincent P. Piazza is a resident citizen of the State of Alabama, his residence address being 120 Bonita Drive, Birmingham, Alabama. Plaintiff Jimmie O. Wiley is a resident citizen of the State of Alabama, his residence address being Dora, Alabama. Plaintiff Howard D. Keplinger, Jr., is a resident citizen of the State of Alabama, his residence address being 7400—52nd Court, North, Birmingham, Ala-

bama. Plaintiff Sam J. Gugliotta is a resident citizen of the State of Alabama, his residence address being 1409 Orvel Street, Birmingham, Alabama.

2. Defendant St. Louis-San Francisco Railroad Company (hereinafter referred to as the Frisco) is a corporation incorporated under the laws of the State of Missouri but which does business in the State of Alabama and in Jefferson County, Alabama, and has a place of business located at 30 South 18th Street, Birmingham, Alabama, and is subject to process by service on Mr. Drayton T. Scott, First National Building, Birmingham, Alabama, who is the statutory agent designated by the Frisco pursuant to Title 7, §144, of the Code of Alabama of 1940, as amended. Defendant, Brotherhood of Railway Carmen of America (hereinafter referred to as the Brotherhood), is an unincorporated association, with its national office located in Kansas City, State of Missouri. The Brotherhood does business and has members residing in the State of Alabama and in Jefferson County, Alabama, and is subject to process by service on Mr. John L. Busby, 5731 Third Avenue, North, Birmingham, Alabama, who is the statutory agent designated by the Brotherhood pursuant to Title 7, §144, of the Code of Alabama of 1940, as amended.

3. Plaintiffs are all employees of defendant Frisco and are classified as Carmen Helpers, also referred to by all of the parties as "Upgrade Carmen." Their job is and has been generally to repair and maintain passenger and freight cars for defendant Frisco in the yard located at Birmingham, Alabama. They are all qualified by experience to do the work of Carmen, a classification to which none of plaintiffs has been promoted. Plaintiffs are all carried on the Carmen Helpers seniority roster of the defendant Frisco with seniority dates as follows:

Name—Seniority Date

James G. Glover—May 8, 1944.

James C. Dent—July 4, 1944.

William H. Greene, Jr.—July 26, 1948.

Paul Cain—September 5, 1948.

Odell Barmore—November 5, 1951.

Carey Gooden—January 12, 1952.

Matthew C. Payne—February 29, 1952.

John E. Jeffries—April 24, 1952.

Albert L. Boyd—April 7, 1953.

Buster Wright—April 16, 1953.

Vincent P. Piazza—June 2, 1953.

Jimmie O. Wiley—June 6, 1956.

Howard D. Keplinger, Jr.—September 11, 1956.

Sam J. Gugliotta—October 10, 1956.

4. Plaintiffs Glover, Dent, Greene, Cain, Barmore, Gooden, Payne, and Jeffries are all Negroes. The remaining plaintiffs are white men. All of the Negro plaintiffs are carried on the seniority roster higher than the white plaintiffs.

5. Plaintiffs are all, in theory, represented by defendant Brotherhood, and their wages, working conditions, and other employment rights are covered by a Collective Bargaining Agreement executed on their behalf by the Brotherhood and the Frisco on, to-wit, January 1, 1945, and amended on, to-wit, June 1, 1952.

6. In order to avoid calling out Negro plaintiffs to work as Carmen and to avoid promoting Negro plaintiffs to Car-

men, in accordance with a tacit understanding between defendants and a subrosa agreement between the Frisco and certain officials of the Brotherhood, defendant Frisco has for a considerable period of time used so-called "apprentices" to do the work of Carmen instead of calling out plaintiffs to do said work as required by the Collective Bargaining Agreement as properly and customarily interpreted; and the Frisco has used this means to avoid giving plaintiffs work at Carmen wage scale and permanent jobs in the classification of Carmen. This denial to plaintiffs of work as Carmen has been contrary to previous custom and practice by defendants in regard to seniority as far as "Upgrade Carmen" are concerned. Defendant Frisco is not calling any of plaintiffs to work as Carmen in order to avoid having to promote any Negroes to Carmen.

7. Because of the nature of their claim and the failure of defendant Brotherhood to institute any grievance on their behalf, the remedies, if any, provided by grievance machinery in the Collective Bargaining Agreement, the grievance machinery in the constitution of the Brotherhood, and the procedure before the National Railroad Adjustment Board, are all wholly inadequate.

8. Plaintiffs aver that they are the victims of an invidious racial discrimination, and each plaintiff has lost wages in excess of $10,000 as a result of the said discrimination in that they have not been correctly called out to work as Carmen and have not been promoted to Carmen when there have been openings for work and promotion in the Carmen work classification.

9. Plaintiffs bring this action both separately and severally, as a class action, and pray both for the fixing of individual damages and for equitable relief in the form of an injunction to cause defendants to cease and desist from

the aforesaid discrimination in all its aspects. Plaintiffs pray for any further, or different relief as may be meet and proper in the premises.

WILLIAM M. ACKER, JR.,
(William M. Acker, Jr.),
CARL ISAACS,
(Carl Isaacs),
Attorneys for Plaintiffs.

Of Counsel:

SMYER, WHITE, REID & ACKER,
Sixth Floor, Title Building,
Birmingham, Alabama.

MOTION TO DISMISS.

Filed Sep. 2, 1965.

(Title Omitted.)

Comes now individual defendant, St. Louis-San Francisco Railway Company, and respectfully moves this Court to dismiss the above styled action, and as its grounds therefor states that:

1. Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

2. Plaintiffs' Complaint complains of and brings into issue matters over which Congress has delegated exclusive jurisdiction to the National Railroad Adjustment Board.

3. Plaintiffs' Complaint on its face reveals that plaintiffs have collectively and individually failed to exhaust administrative remedies admittedly available to them.

4. Plaintiffs' Complaint has failed to allege proper Federal jurisdiction.

5. Plaintiffs' Complaint has completely failed to allege any facts or circumstances which support plaintiffs' conclusionary claim that they are entitled to work as carmen rather than carmen helpers, which position they admittedly are filling.

6. Plaintiffs have failed to allege any complaint against this defendant over which this Court has jurisdiction, the Complaint stating merely alleged wrongful acts performed by co-defendant.

7. Plaintiffs' Complaint completely lacks necessary allegations to constitute a proper class action.

PAUL R. MOODY,
(Paul R. Moody),

300 Frisco Building,
906 Olive Street,
St. Louis, Missouri 63101,

CABANISS, JOHNSTON, GARDNER & CLARK,
By DRAYTON T. SCOTT,
(Drayton T. Scott),
Attorneys for Defendant, St. Louis-San Francisco Railway Company.

902 First National Bldg.,
Birmingham, Alabama 35203.

MOTION TO DISMISS.

Filed Sep. 29, 1965.

(Title Omitted.)

Defendant, Brotherhood of Railway Carmen of America, an unincorporated association, respectfully moves this Court to dismiss this action, and for grounds shows:

1. Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

2. Plaintiffs' Complaint complains of and brings into issue matters over which Congress has delegated exclusive jurisdiction to the National Railroad Adjustment Board.

3. Plaintiffs' Complaint on its face reveals that plaintiffs have collectively and individually failed to exhaust administrative remedies admittedly available to them.

4. Plaintiffs' Complaint has failed to allege proper Federal jurisdiction.

5. Plaintiffs' Complaint shows upon its face a lack of diversity of citizenship between all the parties in that it alleges that this defendant is an unincorporated association, which association has individual members resident in the State of residence of plaintiffs.

6. Plaintiffs' Complaint fails to allege that plaintiffs collectively or individually have exhausted contractual remedies and procedures admittedly available to them.

7. Plaintiffs' Complaint has completely failed to allege any facts or circumstances which support plaintiffs' conclusionary claim that they are entitled to work as carmen rather than carmen helpers, which position they admittedly are filling.

8. Plaintiffs have failed to allege any complaint against this defendant over which this Court has jurisdiction. the

Complaint merely alleged wrongful acts performed by co-defendant.

9. Plaintiffs' Complaint completely lacks necessary allegations to constitute a proper class action.

MULHOLLAND, HICKEY & LYMAN,
By CLARENCE MULHOLLAND,

741 National Bank Building,
Toledo, Ohio,

COOPER, MITCH, JOHNSTON & CRAWFORD,
By JAMES A. COOPER,
Attorneys for Defendant, Brotherhood of Railway Carmen of America.

1025 Bank for Savings Building,
Birmingham, Alabama.

AMENDED MOTION TO DISMISS.

Filed Sep. 30, 1965.

(Title Omitted.)

Comes the defendant St. Louis-San Francisco Railway Company and amends its motion to dismiss heretofore filed by adding thereto the following additional grounds:

8. Plaintiffs' complaint on its face reveals that plaintiffs have failed to exhaust contractual grievance procedures.

9. Plaintiffs' complaint on its face reveals that plaintiffs have not requested co-defendant, Brotherhood of Railway Carmen of America, to pursue on their behalf any grievance procedures contained in agreements between the defendants.

10. Plaintiffs' complaint on its face reveals that plaintiffs have not requested co-defendant, Brotherhood of Railway Carmen of America, to pursue on their behalf any grievance procedures contained in agreement between the defendants and that co-defendant, Brotherhood of Railway Carmen of America, if requested, failed to do so.

11. Plaintiffs' complaint on its face reveals that plaintiffs have not requested co-defendant, Brotherhood of Railway Carmen of America, to pursue on their behalf any grievance procedures contained in agreement between the defendants and that co-defendant, Brotherhood of Railway Carmen of America, if requested, failed to do so and that if requested and co-defendant, Brotherhood of Railway Carmen of America, failed to do so, plaintiffs pursued a complaint for failure to do so through the internal grievance procedure of co-defendant, Brotherhood of Railway Carmen of America.

PAUL R. MOODY,
(Paul R. Moody),

300 Frisco Building,
906 Olive Street,
St. Louis, Mo. 63101.

CABANISS, JOHNSTON, GARDNER & CLARK,
By DRAYTON T. SCOTT,
(Drayton T. Scott),
Attorneys for Defendant, St. Louis-San Francisco Railway Company.

902 First National Bldg.,
Birmingham, Ala. 35203.

AMENDED MOTION TO DISMISS.

(Title Omitted.)

Defendant Brotherhood of Railway Carmen of America, an unincorporated association, by leave of Court first had, amends its motion to dismiss, in the following particulars only, by adding:

10. Plaintiffs' complaint on its face discloses that plaintiffs have not requested this defendant to process any grievance on their behalf; have faied to pursue remedies available to them through the internal grievance procedure of the applicable collective bargaining agreement; and have failed to pursue any complaint for failure of this defendant to process any grievance through the applicable internal grievance procedure or appeals procedure available within the union, and have not exhausted the appeals procedure available within the union.

MULHOLLAND, HICKEY & LYMAN,
By CLARENCE MULHOLLAND,

741 National Bank Building,
Toledo, Ohio.

COOPER, MITCH, JOHNSTON & CRAWFORD,
By JEROME A. COOPER,
Attorneys for Defendant, Brotherhood of Railway Carmen of America.

1025 Bank For Savings Building,
Birmingham, Alabama.

Filed Jul. 28, 1966.

(Title Omitted.)

This cause, coming on to be heard, was submitted upon the respective motions of the defendants to dismiss this action and upon the briefs and oral arguments of counsel.

Instituted as a class action, plaintiffs assert that this Court has jurisdiction both because of diversity of citizenship and the presence of a federal question.

The allegations of fact in the complaint may be briefly summarized. (1) Plaintiffs are employed by defendant railroad as carmen helpers, known as "Upgrade Carmen" and, although qualified by experience to be carmen, none have been promoted to that classification. (2) Plaintiffs are represented by defendant Union and their employment rights are covered by a collective bargaining agreement negotiated by defendant Union. (3) Defendants have conspired to avoid calling certain Negro plaintiffs to perform work and since the white plaintiffs stand below the Negro plaintiffs on the seniority roster all are thereby being discriminated against. (4) Defendant Railroad uses "apprentices" to perform work in lieu of calling out plaintiffs.

Alleging that they are the victims of an invidious racial discrimination and that each has lost wages in excess of ten thousand dollars as a result thereof, plaintiffs pray for equitable relief enjoining defendants to cease and desist from such discrimination in all its aspects and for award of individual damages.

It affirmatively appears from averments in the complaint that plaintiffs have not availed themselves of remedies provided by grievance machinery in the collective bargaining agreement, the grievance machinery in the constitution of the Brotherhood, and the procedure before the National Railroad Adjustment Board.

This Court is of the opinion that such remedies are to be pursued as a prerequisite to relief in the federal Courts. Neal v. System Board of Adjustment (Mo. Pac. R.), 348 F. 2d 722 (8th Cir. 1965); Wade v. Southern Pacific Co., 243 F. Supp. 307 (S. D. Texas 1965); cf. Haynes v. U. S. Pipe & Foundry Co., ... F. 2d ... (5th Cir. 6-14-66, No. 22727).

The conclusory averment that because of the nature of their claim and the failure of defendant Brotherhood to institute any grievance on their behalf such remedies are wholly inadequate is not equivalent to a contention that they are unavailable. To indulge such a presupposition would be to sterilize procedures adopted to promote industrial peace.

It is noteworthy that there is presently pending on the docket of this Court Civil Action No. 66-65, styled James C. Dent v. St. Louis-San Francisco Railway Company, et al., brought under Title VII of the Civil Rights Act, 42 U. S. C. A., § 2000e, wherein identical relief is sought for members of the class represented by the plaintiffs herein.

For failure of the complaint to state a claim upon which relief can be granted an order will be entered dismissing this action.

Done, this the 28th day of July, 1966.

SEYBOURN H. LYNNE,
Chief Judge.

A True Copy.

WILLIAM E. DAVIS,
Clerk, United States District Court,
Northern District of Alabama,
By MARY L. TORTORICI,
Deputy Clerk

(Seal)

(Title Omitted.)

In conformity with the memorandum opinion of the Court contemporaneously entered herein:

It Is Ordered, Adjudged and Decreed by the Court that this action be and the same is hereby dismissed without prejudice.

Done, this the 28th day of July, 1966.

SEYBOURN H. LYNNE,
Chief Judge.

A True Copy.

WILLIAM E. DAVIS,
Clerk, United States District Court, Northern District of Alabama,

By MARY L. TORTORICI,
Deputy Clerk.

(Seal)

Filed Jul. 28, 1966.

MOTION TO SET ASIDE OR TO AMEND ORDER OF DISMISSAL.

Filed Aug. 4, 1966.

(Title Omitted.)

Come now all plaintiffs in the above styled cause and respectfully show unto the Honorable Court and aver as follows:

1. In plaintiffs' brief in opposition to the motions to dismiss, plaintiffs said in conclusion as follows:

If the Court should disagree with this brief and should agree with defendants' contention that the complaint is insufficient to demonstrate jurisdiction, then plaintiffs respectfully request that the order of this Court set out

wherein the complaint is insufficient and that the Court allow plaintiffs time within which to amend their complaint to supply any deficiencies.

2. Certain of the alleged deficiencies relied upon by the Court in the Decree of Dismissal entered on, to-wit, July 28, 1966, can be obviated by averments to be contained in a proposed amendment to the complaint, more particularly, averments to the effect that plaintiffs did make bona fide but unsuccessful and frustrating attempts to avail themselves of the purported administrative remedies provided by the Union constitution and the collective bargaining agreement.

Wherefore Premises Considered, plaintiffs respectfully move that the order of Dismissal entered on, to-wit, July 28, 1966 be set aside or appropriately amended for the sole and limited purpose of allowing plaintiffs a reasonable time within which to amend their complaint.

WILLIAM M. ACKER, JR.,
(William M. Acker, Jr.),
CARL ISAACS,
(Carl Isaacs),
Attorneys for Plaintiffs.

Of Counsel:
SMYER, WHITE, REID & ACKER,
600 Title Building,
Birmingham, Alabama.

(Title Omitted.)

This cause, coming on to be heard, was submitted upon the motion filed in behalf of plaintiffs to set aside or to amend the order of dismissal entered herein on July 28, 1966, in conformity with the memorandum opinion

contemporaneously entered therewith. Treating such motion as a motion to amend the complaint to cure the defects points out in such memorandum opinion:

It is Ordered, Adjudged and Decreed by the Court that plaintiffs are granted leave to amend their complaint on or before September 30, 1966, if they are so advised.

Done, this the 16th day of September, 1966.

SEYBOURN H. LYNNE,
Chief Judge.

Filed Sep. 19, 1966.

AMENDMENT TO COMPLAINT.

Filed Sep. 29, 1966.

(Title Omitted.)

Comes now James G. Glover, James C. Dent, William H. Greene, Jr., Paul Cain, Odell Barmore, Carey Gooden, Matthew C. Payne, John E. Jeffries, Albert L. Boyd, Buster Wright, Vincent P. Piazza, Jimmie O. Wiley, Howard D. Keplinger, Jr., and Sam G. Gugliotta, plaintiffs in the above styled cause, and, with leave of the Court already had and obtained, amend their complaint by changing paragraph 7 thereof so that it will read as follows:

7. On many occasions the Negro plaintiffs through one or more of their number, have complained both to representatives of the Brotherhood and to representatives of the Company about the foregoing discrimination and violation of the Collective Bargaining Agreement. Said Negro plaintiffs have also called upon the Brotherhood to process a grievance on their behalf with the Company under the machinery provided by the Collective Bargaining Agreement. Although a representative of the Brother-

hood once indicated to the Negro plaintiffs that the Brotherhood would "investigate the situation", nothing concrete was ever done by the Brotherhood and no grievance was ever filed. Other representatives of the Brotherhood told the Negro plaintiffs time and time again: (a) that they were kidding themselves if they thought they could ever get white men's jobs; (b) that nothing would ever be done for them; and (c) that to file a formal complaint with the Brotherhood or with the Company would be a waste of their time. They were told the same things by local representatives of the Company. They were treated with condescension by both Brotherhood and Company, sometimes laughed at and sometimes "cussed", but never taken seriously. When the white plaintiffs brought their plight to the attention of the Brotherhood, they got substantially the same treatment which the Negro plaintiffs received, except that they were called "nigger lovers" and were told that they were just inviting trouble. Both defendants attempted to intimidate plaintiffs, Negro and white. Plaintiffs have been completely frustrated in their efforts to present their grievance either to the Brotherhood or to the Company. In addition, to employ the purported internal complaint machinery within the Brotherhood itself would only add to plaintiffs' frustration and, if ever possible to pursue it to a final conclusion it would take years. To process a grievance with the Company without the cooperation of the Brotherhood would be a useless formality. To take the grievance before the National Railroad Adjustment Board (a tribunal composed of paid representatives from the Companies and the Brotherhoods) would consume an average time of five years, and would be completely futile under the instant circumstances where the Company and the Brotherhood are working "hand-in-glove". All of these purported administrative remedies are wholly inadequate, and to require their complete exhaustion would simply add to plaintiffs' expense and frustration, would exhaust plain-

tiffs, and would amount to a denial of "due process of law", prohibited by the Constitution of the United States.

WILLIAM M. ACKER, JR.,
(William M. Acker, Jr.),
CARL ISAACS,
(Carl Isaacs),
Attorneys for Plaintiffs.

Of Counsel:
SMYER, WHITE, REID & ACKER,
6th Floor, Title Building,
Birmingham, Alabama.

MOTION TO DISMISS AMENDMENT TO COMPLAINT AND TO ADHERE TO ORDER OF DISMISSAL.

Filed Oct. 12, 1966.

(Title Omitted.)

Comes now St. Louis-San Francisco Railway Company, one of the defendants in this cause, and moves that the Amendment to Complaint be dismissed, that the Order of Dismissal entered by the Court in this cause on July 28, 1966 be adhered to, and that the Complaint as last amended be dismissed, and as grounds therefor, asserts as follows, separately and severally:

1. The allegations of the Amendment to Complaint do not cure the defects of the Complaint, pointed out in the Court's Memorandum Opinion of July 28, 1966, that "plaintiffs have not availed themselves of remedies provided by the grievance machinery in the collective bargaining agreement, the grievance machinery in the constitution of the Brotherhood, and the procedure before the National Railroad Adjustment Board."

2. The allegations of the Amendment to Complaint are no more than conclusionary averments of alleged futility and not the unavailability of remedies which must exist in order to justify their disregard.

3. It affirmatively appears from the allegations of the Amendment to Complaint that "no grievance was ever filed" under the grievance procedure of the collective bargaining agreement, although the plaintiffs could have done so and may do so.

4. The allegations of the Amendment to Complaint show on their face that the plaintiffs have not attempted to pursue their internal remedies within the Brotherhood, that they have not attempted to process a grievance with this defendant, and that they have not attempted to pursue their remedies before the National Railroad Adjustment Board.

5. The allegations of the Amendment to Complaint show on their face that the plaintiffs have not collectively and individually pursued or exhausted the administrative remedies admittedly available to them and instead seek to justify their disregard by averments of alleged futility and alleged time involved in the use of such remedies.

DRAYTON T. SCOTT,
(Drayton T. Scott),
WILLIAM F. GARDNER,
(William F. Gardner),
PAUL R. MOODY,
(Paul R. Moody),
CABANISS, JOHNSTON,
GARDNER & CLARK.

901 First National Building,
Birmingham, Alabama.

MOTION TO DISMISS AMENDMENT TO COMPLAINT.

Filed Oct. 19, 1966.

(Title Omitted.)

Comes now defendant Brotherhood of Railway Carmen of America, an unincorporated association, and files this motion to dismiss the complaint as last amended, and as grounds therefor shows:

1. The amendment to the complaint fails to allege sufficient facts to establish that plaintiffs have availed themselves, as set forth in the Court's Memorandum Opinion of July 28, 1966, "of remedies provided by grievance machinery in the collective bargaining agreement, the grievance machinery in the constitution of the Brotherhood, and the procedure before the National Railroad Adjustment Board."

2. The amendment to the complaint fails to allege facts to establish that the plaintiffs have separately or collectively exhausted administrative remedies available to them by virtue of the contract, grievance machinery and constitution of this defendant and by law before the National Railroad Adjustment Board and does not allege facts that would relieve plaintiffs of such failure.

MULHOLLAND, HICKEY & LYMAN,
By DONALD W. FISHER, ESQ.,

741 National Bank Building,
Toledo, Ohio 43604.

COOPER, MITCH & CRAWFORD,
By JEROME A. COOPER,
Attorneys for Defendant, Brotherhood of Railway Carmen of America.

1025 Bank for Savings Bldg.,
Birmingham, Alabama.

(Title Omitted.)

This cause, coming on to be heard, was submitted to the Court on defendants' motions to dismiss the complaint as amended.

Upon consideration of said motions, and it appearing to the Court that the amendment to the complaint filed herein on September 29, 1966, does not cure the defects pointed out in the memorandum opinion of this Court entered herein on July 28, 1966, it is the opinion of the Court that this action is due to be dismissed.

Accordingly, it is Ordered, Adjudged and Decreed by the Court that this action be and the same is hereby dismissed.

Done, this the 7th day of November, 1966.

SEYBOURN H. LYNNE,
Chief Judge.

A True Copy.

WILLIAM E. DAVIS,
Clerk, United States District Court, Northern District of Alabama,
By MARY L. TORTORICI,
Deputy Clerk.

(Seal)

Filed Nov. 8, 1966.

NOTICE OF APPEAL.

Filed Nov. 28, 1966.

In the United States District Court for the Northern District of Alabama, Southern Division.

James G. Glover, et al., Plaintiffs,

vs.

Civil Action No. 65-477.

St. Louis-San Francisco Railway Company, et al., Defendants.

Come now James G. Glover, James C. Dent, William H. Green, Jr., Paul Cain, Odell Barmore, Carey Gooden, Matthew Payne, John E. Jeffries, Albert L. Boyd, Buster Wright, Vincent P. Piazza, Jimmie O. Wiley, Howard D. Keplinger, Jr., and Sam B. Gugliotta and respectfully appeal to the United States Court of Appeals for the Fifth Circuit from the judgment and decree entered in this cause, on, to-wit, November 7, 1966, sustaining defendants' motion to dismiss and dismissing the complaint as amended. Plaintiffs-Appellants hereby request the Clerk to mail copies of this notice in accordance with Rule 73 (b) of the Federal Rules of Civil Procedure.

WILLIAM M. ACKER, JR.,
(William M. Acker, Jr.),
CARL ISAACS, JR.,
(Carl Isaacs, Jr.),
Attorneys for Plaintiffs-Appellants.

APPEAL BOND.

Filed Nov. 28, 1966.

(Title Omitted.)

State of Alabama,
Jefferson County.

We, the undersigned, jointly and severally, hereby acknowledge ourselves security for costs of the appeal in this cause to the United States Circuit Court of Appeals for the Fifth Circuit up to and including the sum of Two Hundred Fifty and no/100 ($250.00) Dollars. We hereby agree to pay all appeal costs not exceeding said sum if the appeal is dismissed or the judgment affirmed (or such costs as the appellate Court may award if the judgment is modified).

JAMES G. GLOVER,
JAMES C. DENT,
WILLIAM H. GREEN, JR.,
PAUL CAIN,
ODELL BARMORE,
CAREY GOODEN,
MATTHEW PAYNE,
JOHN E. JEFFRIES,
ALBERT L. BOYD,
BUSTER WRIGHT,
VINCENT P. PIAZZA,
JIMMIE O. WILEY,
HOWARD D. KEPLINGER, JR.,
SAM G. GUGLIOTTA,
By WILLIAM M. ACKER, JR., (L.S.),
(William M. Acker, Jr.),
Attorney-in-Fact,
SHUFORD B. SMYER, (L.S.),
(Shuford B. Smyer),
CARL ISAACS, JR., (L.S.),
(Carl Isaacs, Jr.).

CLERK'S CERTIFICATE.

United States of America,
Northern District of Alabama.

I, WILLIAM E. DAVIS, Clerk of the United States District Court for the Northern District of Alabama do hereby certify that the foregoing pages numbered from one (1) to thirty-one (31), both inclusive, comprise the original pleadings in the foregoing civil action and are herewith attached as a full, true and correct transcript of the record on appeal in the Matter of James G. Glover, et al., Appellants, vs. St. Louis-San Francisco Railway Company, et al., Appellees, Civil Action 65-477, Southern Division, as fully as the same appears of record and on file in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of said Court at Birmingham, Alabama, in said District, on this the 1st day of December, 1966.

WILLIAM E. DAVIS,
(William E. Davis),
Clerk, United States
District Court.

(Seal)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. [redacted]38

JAMES G. GLOVER et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

Of Respondent Brotherhood of Railway Carmen of America in Opposition.

RICHARD R. LYMAN,
741 National Bank Building,
Toledo, Ohio 43604,

JEROME A. COOPER,
BENJ. L. ERDREICH,
1025 Bank for Savings Building,
Birmingham, Alabama 35203,

Attorneys for Respondent, Brotherhood of Railway Carmen of America.

MULHOLLAND, HICKEY & LYMAN,
741 National Bank Building,
Toledo, Ohio 43604,

and

COOPER, MITCH & CRAWFORD,
1025 Bank for Savings Building,
Birmingham, Alabama 35203,

Of Counsel.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

INDEX.

Cases Cited.

Statute Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. .....

JAMES G. GLOVER et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

Of Respondent Brotherhood of Railway Carmen of America in Opposition.

Respondent Brotherhood files this brief in opposition to the petition for certiorari filed by James G. Glover, et al. to review a judgment of the Court of Appeals for the Fifth Circuit rendered on December 5, 1967.

OPINIONS BELOW.

The opinions of the District Court appear at pages 65 and 74 of the Petition (57 LC, ¶ 9097). The opinion of the Court of Appeals appears at page 51 of the Petition and is reported at ... F. 2d.... (57 LC, ¶ 9098).

QUESTIONS PRESENTED.

The question is:

Did the Courts below correctly decide that a mixed group of railroad carmen helpers (white and Negro) could not sue upon a contract claim for promotion to carmen, absent exhaustion or attempted exhaustion of available contractual and administrative remedies?

COUNTER-STATEMENT.

Petitioners elected not to attempt (1) to utilize appellate procedures available within the union, or (2) to proceed before the National Railroad Adjustment Board (referred to herein as "Board").

That Board is the administrative agency designated by Congress to construe and interpret collective bargaining contracts in the railroad industry. It has the concomitant duty to pass upon employee claims and grievances arising under such contracts.

Petitioners imply that the Board is beholden to these parties.[1] The petition states:

> "To take the grievance before the National Railroad Adjustment Board (a tribunal composed of paid representatives from the Companies and the Brotherhoods) would consume an average time of five years, and would be completely futile under the instant circumstances where the Company and the Brotherhood are working 'hand-in-glove.'" Petition, p. 70.

The statement is incorrect.

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[1] Congress, of course, has fixed the composition of the Board, 45 U. S. C. A., Sec. 151, *et seq.*, and that matter is not appropriately in issue.

In fact, the docket of the Second Division of the Board which has jurisdiction over claims of railroad shop craft employees including carmen, is current. Claims before that Division may be handled to a conclusion in a matter of months.[2] In response to a question during oral argument, the Court of Appeals below was so advised.

It is of more than passing interest that the Circuit Court of Appeals below has borne a major portion of the burden of judicially exorcising racial discrimination during the past two decades. And, particularly, the panel which heard this case was presided over by perhaps one of the most distinguished of jurists who has participated in that great work.

---

[2] Also, the docket of the First Division of the Board, alluded to by this Court in **Walker v. Southern Railway Company**, 385 U. S. 196, 198, is almost current. This improvement is attributable to the adoption of the 1966 Amendments to Sec. 3 Second of the Railway Labor Act, providing for the creation of special boards of adjustment. 45 U. S. C. A., § 151, *et seq.*, § 153 Second.

ARGUMENT.

I. The Writ Should Be Denied.

(a) The Decision Below Is in Accord With Applicable Decisions of This Court.

Petitioners would have this Court extend to them the umbrella of the Court's concern for racial minorities.

But this is a group of white and Negro employees.

Petitioners do not attack the collective bargaining contract as racially discriminatory or as otherwise invalid. On the contrary, petitioners only assert rights under the contract, rights which they say have been denied to them. It is permission to promote "to 'carman' as called for by the contract," that they seek (Petition, p. 4).

Vindication of any such contract rights is the precise business which is the Board's exclusively.[3]

(b) The National Railroad Adjustment Board Has Exclusive Jurisdiction Over This Dispute Which Involves an Attempt by Employees to Enforce Rights Allegedly Guaranteed by an Applicable Collective Bargaining Agreement.

Congress, by 45 U. S. C. A., § 151, *et seq.*, provided the tribunal for settling disputes arising out of the interpre-

---

[3] If petitioners are saying, as they seem to imply, that as individual railroad employees they cannot process their own contractual grievances before the Board, they are mistaken. They have the right to present their grievances to the Board, whether or not their union representative, assuming it had received a request to do so, acts to that end. See **McElroy v. Terminal Railroad Assn.**, ... F. 2d ..., ..., 67 LRRM 2681, 2684 (7th Cir. Feb. 28, 1968), citing **Elgin, Joliet and Eastern Ry. v. Burley**, 325 U. S. 711; **Rose v. Great No. Ry. Co.**, 268 F. 2d 674 (5th Cir. 1959); **Colbert v. Brotherhood of Railroad Trainmen**, 206 F. 2d 9 (9th Cir. 1953), **cert. denied** 346 U. S. 931; **Davis v. Southern Ry.**, 256 Ala. 202, 54 So. 2d 308; **Hippensteel v. System Federation 9, etc.**, 337 Mich. 251, 59 N. W. 2d 278.

tation or application of agreements concerning rates of pay, rules, or working conditions of employees in the railroad industry.

Initially, this Court in **Moore v. Illinois Central R. R.**, 312 U. S. 530 (1941), held that the creation of this Board did not prevent the courts from exercising their traditional jurisdiction over an action by an employee for damages for wrongful discharge in violation of his contract of employment.

Subsequently, in the companion cases of **Slocum v. Delaware, L. & W. R. R.**, 339 U. S. 239 (1950), and **Order of Ry. Conductors of America v. Southern Ry.**, 339 U. S. 255 (1950), the decision in **Moore** was limited to an action for wrongful discharge (where the employee chose to accept the discharge as final and did not seek to attack its validity before the Board). Jurisdiction of the Board over questions of interpreting and applying collective agreements (which "involve questions of future relations between the Railroad and its other employees," 339 U. S. at 580) was held to be **exclusive.**

Petitioners would avoid the above principle by alleging that the collective agreement here is being misapplied as to them because of "racial" discrimination. But, whatever the complaint below may be said to contain, it hardly describes any racial discrimination, since it alleges that petitioners are both Negro and white.

Even if it be assumed that the allegations in the complaint raise a question of racial discrimination, it is significant that those cases which have permitted suit in court without attempted redress before the Board, such as **Steele v. Louisville & Nashville R. R.**, 323 U. S. 192 (1944), upon which petitioners rely, involve a denial of the validity of a collective agreement, not interpretation and application of that agreement. Here, petitioners seek

to enforce rights under the collective agreement, not to set aside this agreement as in, for example, **Steele**, *supra*.

This distinction was explained in **Brotherhood of Railroad Trainmen v. Howard**, 343 U. S. 768 (1952): "The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in **Slocum v. Delaware, L. & W. R. R. Co.**, 339 U. S. 239. This dispute involves the validity of the contract, not its meaning" 343 U. S. at 774.

See, also, **Tunstall v. Brotherhood of Locomotive F. & Enginemen**, 323 U. S. 210 (1944).

Petitioners also cite **Conley v. Gibson**, 355 U. S. 41 (1957). However, **Conley** was an action which sought not to enforce contractual rights against the employer under the collective agreement, but instead to impel the union to handle grievances for claims of Negroes (where it was shown that the union had processed grievances for white employees similarly situated). **Conley** thus involved a question of the failure on the part of the union to represent employees, as distinguished from the interpretation or application of economic benefits under the collective agreement as here.

(c) Exhaustion of Administrative Remedies Both Under the Collective Bargaining Agreement and the Constitution of the Brotherhood Is a Prerequisite to This Suit.

Exhaustion of remedies under the collective agreement or within the review procedures of the union organization is an accepted prerequisite to judicial relief. This general principle has been widely recognized by the lower Federal courts. It was recognized by this Court in **Republic Steel Corp. v. Maddox**, 379 U. S. 650 (1965):[4]

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[4] See also the decision by this Court, **Vaca v. Sipes**, 386 U. S. 171.

"As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must **attempt** use of the contract grievance procedure agreed upon by employer and union as the mode of redress. . . . And it cannot be said in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so."

379 U. S. at 652-53 (emphasis in text).[5]

CONCLUSION.

Petitioners seek judicial enforcement of rights allegedly guaranteed them under the collective agreement which exists between the Brotherhood and the railroad. Such a claim for relief exclusively rests within the province of the Board.

Petitioners also admit their failure to attempt utilization of the contractual grievance machinery or the internal remedies within the union organization. This failure to exhaust administrative remedies is likewise fatal to their claim.

The claim of petitioners was thus properly dismissed.

---

[5] In **Walker v. Southern Railway Company**, 385 U. S. 196, 87 S. Ct. 365 (1966), this Court decided that **Maddox** did not overrule **Moore** and held that under the Railway Labor Act a discharged employee may (as in **Moore**) either pursue his administrative remedies or accept his discharge as final and immediately seek redress in court. The instant case of course does not involve a discharged employee. On the contrary, here a continuing relationship exists and these petitioners seek to have the collective agreement enforced for their benefit. Under such circumstances the clearly enunciated federal policy favoring exhaustion of administrative remedies is, it is submitted, applicable, unaffected by **Walker**.

For the reasons given, Brotherhood respectfully prays that certiorari be denied.

Respectfully submitted,

RICHARD R. LYMAN,
741 National Bank Building,
Toledo, Ohio 43604,

JEROME A. COOPER,

BENJ. L. ERDREICH,
1025 Bank for Savings Building,
Birmingham, Alabama,

Attorneys for Respondent,
Brotherhood of Railway
Carmen of America.

MULHOLLAND, HICKEY & LYMAN,
741 National Bank Building,
Toledo, Ohio 43604,

COOPER, MITCH & CRAWFORD,
1025 Bank for Savings Building,
Birmingham, Alabama 35203,

Of Counsel.

Certificate of Service.

I hereby certify that I have served the foregoing by mailing, postage prepaid, a copy to William M. Acker, Jr., 6th floor, Title Building, Birmingham, Alabama 35203; Carl Isaacs, Woodward Building, Birmingham, Alabama 35203; Paul R. Moody, 300 Frisco Building, 906 Olive Street, St. Louis, Missouri; and Cabaniss, Johnston, Gardner & Clark, 900 First National Building, Birmingham, Alabama, this 28th day of March, 1968.

.....

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938

No. 38

JAMES G. GLOVER, et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

Of Respondent St. Louis-San Francisco Railway Company In Opposition.

PAUL R. MOODY,
300 Frisco Building,
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 1193.

JAMES G. GLOVER, et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

Of Respondent St. Louis-San Francisco Railway Company In Opposition.

OPINIONS BELOW.

The opinion of the Fifth Circuit Court of Appeals below is set forth at page 51 of the Petition. The opinion of the District Court below appears at page 65 of the Petition.

QUESTIONS PRESENTED.

(1) Does a federal district court have jurisdiction to hear and try the claim of a group of presently employed railroad employees based squarely on the employees' collective bargaining agreement before the employees present the claim to the National Railroad Adjustment Board?

(2) Must employees claiming a contract grievance under their collective bargaining agreement attempt to pursue contractual and intra-union remedies prior to asserting their grievance in a federal district court?

STATEMENT.

This suit was instituted by fourteen employees of the Frisco Railroad alleging that they were entitled to certain promotional rights under the Frisco's collective bargaining agreement with the Brotherhood of Railway Carmen of America. Both the Frisco and the Brotherhood were named as defendants. Specifically the complaint stated that the plaintiffs, who were carmen helpers, were being denied an alleged right to work as carmen under the "Collective Bargaining Agreement as properly and customarily interpreted" (Petition, p. 58). The District Court dismissed the complaint stating in a memorandum opinion that it affirmatively appeared "from averments in the complaint that plaintiffs [had] not availed themselves of remedies provided by grievance machinery in the collective bargaining agreement, the grievance machinery in the constitution of the Brotherhood, and the procedure before the National Railroad Adjustment Board"[1] (Petition, p. 65).

The Fifth Circuit Court of Appeals in a panel composed of Judges Rives, Goldberg and Dyer affirmed unanimously the decision of the District Court.

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[1] Subsequently the petitioners amended their complaint in an effort to cure the defects found in it by the District Court. The District Court found that the amendment did not cure the defect and ordered the action dismissed.

ARGUMENT.

At the outset it should be noted that the issues presented by the petition are substantially identical to those decided by the Eighth Circuit Court of Appeals in *Howard v. St. Louis-San Francisco Railway Company*, 361 F. 2d 905 (8th Cir. 1966), in which case this court last term denied certiorari. 385 U.S. 986 (No. 651, 1966).

The decision in the Fifth Circuit below affirming the dismissal is, moreover, clearly correct, being based both on the exclusive jurisdiction of the National Railroad Adjustment Board over petitioners' claim and on petitioners' by-passing the grievance procedure of their collective bargaining agreement and remedies within the Brotherhood. The decision based on both of these independent grounds is thoroughly in line with the applicable decisions of this Court. Furthermore, the decision presents no conflict with other decisions either within or without the Fifth Circuit. Accordingly, the petition in this case should be denied.

I. The National Railroad Adjustment Board has exclusive jurisdiction over the claim made by the petitioners in this suit.

Since the claim which the petitioners would have had the District Court adjudicate is obscured by the racial discrimination charges which they argue in their brief, it is in order at the outset to consider this claim for what it is in fact.

The claim consists of petitioners' grievance that they are entitled to perform the work in question, that the assignment of the work to them is "required by the Collective Bargaining Agreement as properly and customarily interpreted," and that the alleged denial of work to them "has been contrary to previous custom and practice by defendants in regard to seniority" (Petition, p. 58).

In order to resolve this claim, therefore, it will be necessary to interpret and apply the collective bargaining agreement "as properly and customarily interpreted", determine the "previous custom and practice" which has been followed, and interpret and apply the terms of the agreement in regard to seniority.

The petitioners neither in their complaint nor in any other pleadings filed in the District Court made any allegation that they had made the least effort to present their claim made in this suit to the National Railroad Adjustment Board. Nor do they, nor can they, attempt to excuse this failure to resort to the Adjustment Board on their allegations that the Brotherhood takes a hostile attitude toward them. "There is no doubt that individual employees, such as plaintiffs here, whose interests viz a viz their employer are hostile to those of their union, have standing to present grievances to the Adjustment Board, irrespective of the union's position." *Thompson v. New York Central R. Co.*, 361 F. 2d 137, 143 (2d Cir. 1966).

The claim asserted here by petitioners which they did not present to the National Railroad Adjustment Board is clearly one over which the Adjustment Board has exclusive jurisdiction under this Court's decision in *Slocum v. Delaware L. & W. R. Co.*, 339 U.S. 239, 244 (1950). The complaint shows patently that the claim in this case, as the claim in *Slocum*, requires "interpretation of an existing bargaining agreement. Its settlement [will] have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted [will] govern future relations of those parties." 339 U.S. at p. 242.[2]

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[2] Because the claim presented here involves the future working relationship between the railroad and its employees, it, just as the claim in *Slocum*, does not fall under the rule of *Moore v. Illinois Cent. R. Co.*, 312 U.S. 630 (1941) and *Walker v. Southern R. Co.*, 385 U.S. 196 (1966) that a discharged employee accepting

Faced with this clear mandate in *Slocum*, preventing jurisdiction in the District Court below, petitioners seek to show a "counter-balancing trend" of decisions which except their claim from the rule of *Slocum*. The cornerstone of this trend which petitioners labor to establish to relieve them from submitting the claim to the Railroad Adjustment Board is that line of cases commencing with *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944).[3]

The fact is that this case could be regarded as being within the *Steele* principle only by completely disregarding both the established criteria of the *Steele* principle and the pages of the record which set forth the claim petitioners have asked the District Court to adjudicate.

On the one hand, the *Steele* line of cases stands for the proposition that the courts have jurisdiction where employees rely on a federal statute or the Constitution, complain of a breach of a union's fiduciary duty to represent them fairly, without discrimination, and where, to use this Court's words, "The claims . . . cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in Slocum . . . ." *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 774 (1952).

The claim here against the Frisco on the other hand is a contract claim based squarely and solely on the collec-

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his discharge as final may sue for money damages without first presenting his claim to the Railroad Adjustment Board. This is simply not a discharge case.

[3] *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944); *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952); *Graham v. Brotherhood of Railroad Firemen*, 338 U.S. 232 (1949); *Conley v. Gibson*, 355 U.S. 41 (1957).

tive bargaining agreement. It, thus on its face, falls outside the *Steele* decision, which decision expressly recites that in that case were no ". . . differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board." 323 U.S. at p. 205. And in *Conley v. Gibson*, 355 U.S. 41 (1957), the most recent case of this Court cited by petitioners to establish their so-called "counter-balancing trend," this Court stated ". . . the contract between the Brotherhood and the Railroad will be, at most, only incidentally involved in resolving this controversy between petitioners and their bargaining agent." 355 U.S. at p. 45.

Thus, it is clear that the "counter-balancing trend" which petitioners seek to establish to excuse their failure to resort to the Railroad Adjustment Board does not have any application to this case which calls directly for an interpretation of an existing collective bargaining agreement.

Petitioners' suggestion (Petition, pp. 46-47), that there is a conflict among the Circuit Courts of Appeal with respect to the jurisdiction of the Adjustment Board over a claim, such as the one here, is completely groundless. *Howard v. St. Louis-San Francisco R. Co.*, 361 F. 2d 905 (8th Cir. 1966, cert. denied 385 U.S. 986 (1967)), as petitioners suggest, is thoroughly in line with the decision below. *Brotherhood of Railroad Trainmen v. Central of Georgia R. Co.*, 305 F. 2d 605 (5th Cir. 1962), which petitioners cite as conflicting with *Howard* and the decision below, held squarely that a dispute between a railroad employee and his employer involving the interpretation of a labor contract "was exclusively the responsibility of the Railroad Adjustment Board." 305 F. 2d at 607. *Richardson v. Texas and New Orleans R. Co.*, 242 F. 2d 230 (5th Cir. 1957), another Fifth Circuit case which petitioners

claim to be out of line with *Howard* and the decision below explicitly recognized that, "Here, as in Steele, the allegations of the complaint require no interpretation or administrative application of the bargaining agreement within the special competence of the Adjustment Board, which forecloses judicial relief under Section 3 of the Act." 242 F. 2d at p. 234. The *Desrosiers*[4] case referred to by petitioners obviously presents no conflict in this regard as it did not even involve a claim by a railroad employee. The cases relied on by petitioners to show a conflict therefore present not a discordant but a harmonious pattern formed under *Slocum* and *Steele*.

In short the claim made in this case by these railroad employees against the railroad is one based directly and solely on the collective bargaining agreement. The interpretation growing from the claim clearly will govern the future relations between a large group of employees and the Frisco. This being the undisputed character of the claim, jurisdiction of the National Railroad Adjustment Board over the claim is exclusive under *Slocum*. The District Court therefore properly dismissed the complaint.

II. The Courts below correctly held that petitioners' by-passing of the grievance procedure of the collective bargaining agreement and of remedies within the Brotherhood prevented jurisdiction in the District Court.

The decision below is supported, moreover, on the independent ground that prior to instituting this action, petitioners by-passed the grievance procedure of the collective bargaining agreement and failed to avail themselves of existing remedies within the Brotherhood. This Court in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), stated:

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[4] *Desrosiers v. American Cynamid Company*, 377 F. 2d 864 (2nd Cir. 1967).

> As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress.
>
> 379 U.S. at p. 652 (emphasis in text).

And in *Vaca v. Sipes*, 386 U.S. 171 (1967), the Court repeated:

> Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement.
>
> 386 U.S. at p. 184.

To excuse their failure to utilize the grievance procedure under the collective bargaining agreement, petitioners allege that when they called upon the Brotherhood to process a grievance for them, no action was taken. Nowhere do petitioners allege, however, that any attempt was made to avail themselves of existing internal union remedies. Moreover, the amended complaint establishes petitioners' recognition of the fact that they could process the grievance themselves under the grievance procedure of the collective bargaining agreement. Yet again petitioners made no attempt to avail themselves of this path to settling their claim.

This failure of petitioners to utilize their contractual and internal union remedies clashes with well-established federal labor policy and creates, it is submitted, an independent ground supporting both the dismissal of the complaint by the District Court and the decision in the Fifth Circuit below.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Certificate of Service.

I hereby certify that copies of the foregoing Brief for Respondent St. Louis-San Francisco Railway Company have been served on counsel by mailing copies by U.S. mail, postage prepaid, to Hon. William M. Acker, Jr., 600 Title Building, Birmingham, Alabama, and to Hon. Jerome A. Cooper, Cooper, Mitch & Crawford, Suite 1025 Bank for Savings Building, Birmingham, Alabama.

This the 8th day of April, 1968.

.....

Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 38

JAMES G. GLOVER, *et al.*,
Petitioners,

—v.—

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONERS.

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SUPREME COURT OF THE UNITED STATES

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONERS.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

This Honorable Court, on April 22, 1968, granted petitioners' petition for writ of certiorari, consenting to review the decision of the United States Court of Appeals for the Fifth Circuit. Petitioners respectfully submit this brief on the merits.

THE OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit, rendered on December 5, 1967, is reported at 386 F. 2d 452, and in the Appendix at p. 28. The opinion of the United States District Court for the Northern District of Alabama, Southern Division, ren-

dered on July 28, 1966, and adhered to on November 7, 1966, is unreported, but appears in the Appendix at p. 14.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., § 1254 (1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The only statutory provisions clearly here involved are those which create the National Railroad Adjustment Board, particularly 45 U. S. C., § 153 (First) (i), which is as follows:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties, or by either party, to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

Perhaps also here involved are the "jury trial" and "due process" provisions of the United States Constitution, which are as follows:

> Article VII. In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no facts tried by

a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Article XIV, § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED.

1. Where railroad employees allege a deliberate misinterpretation of the collective bargaining agreement by their Union and Company so as to discriminate racially in seniority and promotion practices, should the employees be required to exhaust intra-Union complaint procedures as a prerequisite to court action?

2. Where railroad employees allege a deliberate misinterpretation of the collective bargaining agreement by their Union and Company so as to discriminate racially in seniority and promotion practices, should the employees be required to exhaust intra-Company complaint procedures provided by the collective bargaining agreement as a prerequisite to court action?

3. Where railroad employees allege a deliberate misinterpretation of the collective bargaining agreement by their Union and Company so as to discriminate racially in seniority and promotion practices, should the employees be required to process their complaint before the National Railroad Adjustment Board as a prerequisite to court action?

4. Where railroad employees allege a deliberate misinterpretation of the collective bargaining agreement by their Union and Company so as to discriminate racially in seniority and promotion practices, should the employees be required to exhaust (a) intra-Union complaint procedures; (b) intra-Company complaint procedures, and (c) N. R. A. B. procedures, all three, as a prerequisite to court action?

5. Do railroad employees who charge racial discrimination by Union and Company in seniority and promotion practices have the burden of pleading detailed facts to demonstrate complete futility in all conceivable extra-judicial or administrative complaint procedures; or does the Union and Company have the defensive pleading burden of demonstrating that applicable grievance procedures actually exist and can fairly operate under the circumstances alleged in the complaint?

STATEMENT OF THE CASE.

Petitioners invoked the jurisdiction of the District Court because of diversity of citizenship of the parties, because there is a federal question involved, and because the damages claimed exceeded Ten Thousand ($10,000.00) Dollars. The original complaint (Appendix pp. 3-8) charged that respondents, St. Louis-San Francisco Railway Company, and Brotherhood of Railway Carmen of America, have between them a tacit understanding and subrosa agreement to use white so-called "apprentices," to perform the work of "carmen" in order to keep from providing petitioners, who are classified as "carmen helpers," enough hours as "carmen" to permit promotion to "carmen" as called for by the contract. The reason for this scheme is to deprive Negro petitioners of job promotion and to keep the "carmen" classification exclusively white. This has the incidental and secondary result of denying promotion opportunity to the white petitioners who happen to stand on the "carmen helper" seniority roster behind Negro petitioners. Petitioners, Negro and white together, seek an end to this discrimination, and further seek to recover the lost wages resulting from past discrimination. On motions to dismiss, which were unaccompanied by any affidavit or pleading showing the structure, or even the existence, of internal grievance procedures (Appendix pp. 8-13), the District Court wrote on opinion (Appendix p. 14), dismissing the action on the ground that petitioners "have not availed themselves of remedies provided by grievance machinery in the collective bargaining agreement, the grievance machinery in the constitution of the Brotherhood, and the procedure before the National Railroad Adjustment Board (Appendix p. 14). The District Court went on to say:

> The conclusory averment that because of the nature of their claim and the failure of defendant Brother-

hood to institute any grievance on their behalf such remedies are wholly inadequate is not equivalent to a contention that they are unavailable. To indulge such a presupposition would be to sterilize procedures adopted to promote industrial peace (Appendix p. 15).

After the decree dismissing the original complaint, petitioners, by permission (Appendix pp. 16-18), amended their complaint, adding the following averments demonstrating the factual futility of their attempts to employ any collective bargaining machinery and the so-called internal grievance procedures of the Brotherhood:

7. On many occasions the Negro plaintiffs through one or more of their number, have complained both to representatives of the Brotherhood and to representatives of the Company about the foregoing discrimination and violation of the collective Bargaining Agreement. Said Negro plaintiffs have also called upon the Brotherhood to process a grievance on their behalf with the Company under the machinery provided by the Collective Bargaining Agreement. Although a representative of the Brotherhood once indicated to the Negro plaintiffs that the Brotherhood would "investigate the situation," nothing concrete was ever done by the Brotherhood and no grievance was ever filed. Other representatives of the Brotherhood told the Negro plaintiffs time and time again: (a) that they were kidding themselves if they thought they could ever get white men's jobs; (b) that nothing would ever be done for them; and (c) that to file a formal complaint with the Brotherhood or with the Company would be a waste of their time. They were told the same things by local representatives of the Company. They were treated with condescension by both Brotherhood and Company, sometimes laughed at and sometimes "cussed," but never taken seriously. When the white plaintiffs brought their plight to the

"attention of the Brotherhood, they got substantially the same treatment which the Negro plaintiffs received, except that they were called "nigger lovers" and were told that they were just inviting trouble. Both defendants attempted to intimidate plaintiffs, Negro and white. Plaintiffs have been completely frustrated in their efforts to present their grievance either to the Brotherhood or to the Company . . . (Appendix pp. 18-20).

Following the amendment of the complaint, and upon motions to dismiss, the District Court found that the amendment did not cure what it concluded was the defect of non-exhaustion of administrative remedies and dismissed the action (Appendix p. 24). On appeal to the Court of Appeals, that court agreed completely with the opinion of the District Court (Appendix p. 28).

ARGUMENT.

This case is unique in several respects. Perhaps its most novel feature is that it is the only case in which any American court has ever laid down a rule to the effect that a railroad employee complaining of racial discrimination in employment practices must exhaust three separate and distinct non-judicial remedies before he can go to court. It would be fair to say that if the collective bargaining agreement or if the Union constitution should provide several complaint procedures in addition to the three found by the District Court, the District Court, on its rationale, would have also made the exhaustion of each and all such procedures prerequisite to judicial relief. There is no limit to the contractual stumbling blocks which might be erected by Union and Company if the reasoning of the District Court is logically extended to require the exhaustion of all possible extra-judicial remedies.

The sure answer to the District Court's (and to the Fifth Circuit's) insistence on following internal procedures "adopted to promote industrial peace" (Appendix p. 15) is two-fold: (1) in face of active opposition by the Union, these internal procedures are useless; and (2) industrial peace is not promoted by the judiciary's keeping "hands off" where Union-Company cooperation is perpetrating racial discrimination. The allegations in the instant complaint charge that both Union and Company, in discussing the alleged internal Union and Company remedies with petitioners, told petitioners, "Don't waste your time!" (Appendix p. 19). Now Union and Company loudly complain because petitioners did not waste their time. Union and Company never affirmatively plead any fact to suggest that an exhaustion of their alleged internal remedies would be anything but the "waste of time" which they themselves described. An expensive and frustrating formality as a prerequisite to court relief does not comport with "due

process of law'' or with the constitutional guarantee of a jury trial. To be denied access to the courts **indefinitely** is to be denied access to the courts and to trial by jury.

The decided cases and the legal writers cited at pp. 7-24 of the petition for writ of certiorari, argue more eloquently than petitioners' counsel can for an early opening of the judicial doors without prior resort to alleged internal remedies if they are futile or illusory. There is no need to repeat the citations contained in the petition itself on this subject. They are well summarized in one of the most recent cases, **Desrosiers v. American Cynanamid,** 377 F. 2d 864 (2d Cir. 1967), where **Vaca v. Sipes,** 386 U. S. 171, 17 L. ed. 2d 842, 87 S. Ct. 903 (1967), is correctly interpreted to do away with an insistence upon an exhaustion of internal remedies where there is allegation and proof of collusion between Company and Union to deny an employee his rights.

It is also worth noting that none of the decisions dealing with the N. R. A. B.'s exclusive jurisdiction over claims by railroad employees makes any mention of the failure to exhaust the complaint procedures within the Brotherhood. The reasons for this absence of pronouncement is obvious. Before this case nobody ever conceived of the idea that the internal **political** procedure of a Union is a prerequisite either to statutory administrative remedies or to court action. Title 45, § 153, U. S. C., suggests an exhaustion of the Company grievance machinery before going to the N. R. A. B., but it certainly does not contemplate a previous or simultaneous exhaustion of the constitution procedures of the Union. One reason Congress did not provide such a prerequisite is that the N. R. A. B. was never designed to hear complaints by an employee against his own Union. In the instant case, the District Court (and Fifth Circuit) is adding a prerequisite which Title 45, § 153, does not in-

sist upon, even if petitioners were so naive as to take their complaint to the N. R. A. B.

The meaning of **Walker v. Southern Railway Company**, 385 U. S. 196, 17 L. ed. 2d 294, 87 S. Ct. 365 (1966), rehearing denied, 385 U. S. 1020, 17 L. ed. 2d 559, 87 S. Ct. 699, is that railroad employees are outside the purview of **Republic Steel v. Maddox**, 379 U. S. 650, 13 L. ed. 2d 580, 85 S. Ct. 614 (1965), **whether collusive racial discrimination is involved or not.** In other words, the District Court's jurisdiction in this case is controlled by the provisions of the Railway Labor Act and not by the Labor Management Relations Act or by the provisions of the collective bargaining agreement or of the Union Constitution. This leaves only the question of whether or not N. R. A. B. jurisdiction under the Railway Labor Act is exclusive when allegations such as in the instant case are made.

The alleged N. R. A. B. remedy as a prerequisite to court action, requires separate treatment, **because it cannot be a prerequisite to court action.** An employee does not exhaust his alleged N. R. A. B. remedy on the way to court. If he invokes N. R. A. B. jurisdiction (which cannot consider complaints by a member against his Union) he can never thereafter go to court. The decision of the N. R. A. B. has been held to be final and binding on an employee. **Pennsylvania Railroad Co. v. Day**, 360 U. S. 548, 3 L. ed. 2d 1422, 79 S. Ct. 1322 (1959); **Coats v. St. Louis-San Francisco Railway Co.**, 230 F. 2d 798 (5th Cir., 1956). Other arguments and authorities are set out in pp. 24-46 of the petition for writ of certiorari and will not be here repeated, except for a reiteration of the significance of **Conley v. Gibson**, 355 U. S. 41, 2 L. ed. 2d 80, 78 S. Ct. 99 (1957). The only possible meaning of footnote 4 in **Conley v. Gibson** (unanimously decided), is that the courts must hear cases involving invidious discrimination

which is participated in both by Union and Company, and that in such cases N. R. A. B. jurisdiction is not exclusive.

At p. 4, footnote 3, of their answer to the petition for writ of certiorari, the Brotherhood of Carmen cite **Davis v. Southern Railway**, 256 Ala. 204, 54 So. 2d 308 (1951). It should be noted that **Davis** was expressly overruled by **Milstead v. Atlantic Coastline R. Co.**, 273 Ala. 557, 142 So. 2d 705, cert. den., 371 U. S. 892, 83 S. Ct. 189, 9 L. ed. 2d 124 (1962), which was based on the rationale of **Conley v. Gibson**, *supra*, and **Steele v. Louisville & Nashville R. Co.**, 223 U. S. 192, 89 L. ed. 173, 65 S. Ct. 226 (1944).

CONCLUSION.

The answer of the Carmen to the petition for writ of certiorari, and the brief which the Carmen filed in the Fifth Circuit, summarize respondents' defense by taking the position that there is no racial discrimination in this case because petitioners are both Negro and white. This assertion is interesting. It proves either that the Carmen are myopic or that they are deliberately attempting to mislead the Court.

The Court knows that in the "good old days" of overt racial discrimination in employment, white petitioners, although admittedly having less seniority than Negro petitioners, would have "run around" Negro petitioners and been promoted to "carmen". No questions would have been asked, and the "carmen" as a classification, would have remained "all white". Under today's closer judicial scrutiny of schemes to discriminate against racial minorities, the Carmen, with Company acquiescence, must be more subtle. So, they have stopped promoting any "carmen helpers", and instead have begun to use all white "apprentices", who have now tacitly become the

only class promotable to "carmen". Respondents here hopefully point to white petitioners as living proof that respondents are not guilty of racial discrimination because they are treating (or mistreating) white and Negro petitioners alike. They gloss over the fact that their treatment of white petitioners is the necessary and direct result of their decision to discriminate against Negro petitioners. Respondents may be admired for the subtlety of a new device, but they should not be congratulated to the extent of allowing a devious method of racial discrimination to continue indefinitely, or permanently, while petitioners beat their heads on the doors of unreal administrative remedies.

Petitioners respectfully pray that the decision and order of the Fifth Circuit be reversed and that the case be remanded for trial on the merits in the District Court where the complaint was originally filed.

Respectfully submitted,

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Certificate of Service.

I, William M. Acker, Jr., one of attorneys-of-record for petitioners, hereby certify that I have mailed a copy of

the foregoing brief to Messrs. Cabaniss, Johnston, Gardner & Clark, First National Building, Birmingham, Alabama 35203, and to Messrs. Cooper, Mitch & Crawford, Bank for Savings Building, Birmingham, Alabama, 35203, attorneys of record for all respondents, by U. S. mail, postage prepaid, this ... day of June, 1968.

.....

William M. Acker, Jr.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 38

JAMES G. GLOVER, *et al.*,

Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT BROTHERHOOD OF RAILWAY CARMEN OF AMERICA.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT BROTHERHOOD OF RAILWAY CARMEN OF AMERICA.

QUESTION PRESENTED.

The question is:

Did the Courts below correctly decide that a mixed group of railroad carmen helpers (white and Negro) could not sue upon a contract claim for promotion to carmen, absent exhaustion or attempted exhaustion of available contractual and administrative remedies?

COUNTER-STATEMENT.

This case was decided in the Courts below on motions to dismiss filed by Respondents Railroad and Brotherhood. The original complaint was dismissed on July 28, 1966 (A. 14-15); the amended complaint on November 8, 1966 (A. 24).

The original complaint alleged that Petitioners, a group of fourteen carmen helpers, consisting of eight

Negroes and six white men, have been denied promotional rights to which purportedly they are entitled under the terms of the applicable collective bargaining agreement solely on account of the fact that the eight most senior members of the group were Negroes. None of the contract provisions relied upon was pleaded either verbatim or in substance, however. The alleged discrimination was said to have been brought about through a "tacit understanding" and "subrosa agreement" between Railroad and Brotherhood pursuant to which journeymen (carmen) were to be selected from the ranks of carmen apprentices rather than from carmen helpers who formerly were temporarily upgraded and were known as "upgrade Carmen" (A. 5-7).

The complaint alleged that damages consist of wage losses in excess of $10,000.00 for each Petitioner caused because "they have not been correctly called out to work as Carmen and have not been promoted to Carmen when there have been openings for work and promotion in the Carmen work classification." Monetary and injunctive relief is sought.

The original complaint took cognizance of three sets of contractual and statutory remedies available to Petitioners. They were alleged to be: (1) the "grievance machinery in the Collective Bargaining Agreement," (2) "the grievance machinery in the constitution of the Brotherhood," and (3) "the procedure before the National Railroad Adjustment Board." Petitioners concluded, however, "(b)ecause of the nature of their claim and the failure of defendant Brotherhood to institute any grievance on their behalf, [these] remedies * * *, are all wholly inadequate" (Complaint, para. 7, A. 7). The district court dismissed the original complaint on the ground that "such remedies are to be pursued as a prerequisite to relief in the federal courts" (A. 14-15). The court stated:

> "The conclusionary averment that because of the nature of their claim and the failure of defendant Brotherhood to institute any grievance on their behalf such remedies are wholly inadequate is not equivalent to a contention that they are *unavailable*." (Emphasis ours.)

After dismissal, Petitioners amended the complaint by substituting a new paragraph 7 (A. 18-20). The language of the substitute paragraph 7 accused unidentified alleged representatives of Respondents Railroad and Brotherhood of verbally discouraging Petitioners from filing grievances with either Railroad or Brotherhood, and, also, charged Brotherhood with failing to prepare and submit *on its own initiative* a grievance on their behalf to attempt to remedy the alleged "violation of the collective bargaining agreement." Petitioners still did *not* allege that the contractual and statutory remedies described in their original complaint were unavailable to them, however; nor did they allege that they, or any of their group, actually attempted to invoke any of such remedies by filing a claim, grievance, or submission with the appropriate person or tribunal. To the contrary, they pleaded that the verbal disparagement of these remedies by the alleged "representatives" of Railroad and Brotherhood made recourse to them unnecessary because they would be "futile." Thus, they alleged:

> "* * * to employ the purported internal complaint machinery within the Brotherhood itself would only add to plaintiffs' frustration and, if ever possible to pursue it to a final conclusion it would take years. To process a grievance with the Company without the cooperation of the Brotherhood would be a useless formality. To take the grievance before the National Railroad Adjustment Board (a tribunal composed of paid representatives from the Companies and the Brotherhoods) would consume an average time of five years, and would be completely futile under the

> instant circumstances where the Company and the Brotherhood are working 'hand-in-glove.' All of these purported administrative remedies are wholly inadequate, and to require their *complete* exhaustion would simply add to plaintiffs' expense and frustration, would exhaust plaintiffs, and would amount to a denial of 'due process of law,' prohibited by the Constitution of the United States." (Emphasis ours.) (A. 19-20.)

The motions of Respondents Railroad and Brotherhood to dismiss Petitioners' amended complaint were sustained by the district court on the ground that the amendment to the complaint "* * * does not cure the defect pointed out in the memorandum opinion of this Court entered herein on July 28, 1966 * * *" (A. 24). The Circuit Court of Appeals affirmed (A. 28).

ARGUMENT.

I. The claim against the Brotherhood for breach of the duty of fair representation was properly dismissed for failure to plead a serious attempt to pursue remedies available under the Brotherhood's constitution.

The district court's dismissal of the initial and amended complaints was predicated upon the narrow but significant ground of failure to exhaust contract and statutory remedies. The merits of the claims Petitioners were seeking to litigate were never reached in the lower courts, so the Brotherhood will not discuss them herein at any length. It seems clear that Petitioners' claim against the Brotherhood is for breach of the duty of fair representation which is imposed by implication from the exclusive representation provisions of the Railway Labor Act [48 Stat. 1185, 45 U.S.C. § 151 et seq.].

Suffice it to say that the Brotherhood, a labor organization national in scope and consisting of thousands of members affiliated in hundreds of local lodges, does not favor, countenance, or condone racial discrimination on the part of the Grand Lodge and its representatives or local lodges or subordinate units and their representatives. The Brotherhood should not, and agrees that it could not legally, enter into a "tacit understanding" or "subrosa agreement" to deny contractual promotional rights to a group of employees solely on account of the race or color of some members of the group, such as is alleged by Petitioners in the complaint. There is no need to belabor this point. The significant question relating to the merits of Petitioners' claim is whether they can prove through competent evidence the facts so broadly alleged in the complaint.

However, the courts below held that Petitioners had a duty as union members to resort to certain remedies contained in the Brotherhood's constitution before seeking relief in court against the Brotherhood for breach of the duty of fair representation. The district court did *not* hold that Petitioners had to exhaust *completely* all possible remedies under the Brotherhood's constitution. No more than a reasonable *attempt* to utilize *available* remedies was required. If the remedies afforded thereunder were somehow deficient because they could not afford proper relief or took too much time or for some other reason, their exhaustion obviously would have been excused. Nevertheless, it requires more than an allegation of the bare conclusion that the union remedies are futile to establish futility as a factual matter in the pleadings.

The recent decision in *Vaca v. Sipes*, 386 U.S. 171 (1967), dealt with the interrelation between suits against

a labor union for breach of the duty of fair representation and suits against an employer for breach of contract. The Court there held that the general rule applicable to suits against the employer as set forth in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) is that "the employee must *at least attempt to exhaust* exclusive grievance and arbitration procedures established in the bargaining agreement." (Emphasis ours.) *Id.* at 184. Certain exceptional circumstances were recognized, however, under which an employee was excused from the duty to resort to them. The same rule of resort to contractual remedies should apply in circumstances where the union member brings suit against the union because a union constitution is generally considered to be a contract of membership between the union and its members, *International Association of Machinists v. Gonzales*, 356 U.S. 617 (1958).

The instant case is one in which, from what the allegations of the complaint reveal, *no* efforts to bring the

that Petitioners do not dispute the availability of procedures to compel grievances to be processed on behalf of employee members. Petitioners evidently are content to stand on the proposition that the alleged informal disparagement of resort to these remedies, by *unidentified* representatives of the Brotherhood, excused them from actually following or utilizing them. This is the issue.

A decision by local level union representatives to refuse to handle a grievance for an employee may be and often is completely reversed at a higher level in the union heirarchy. For instance, in *New Orleans Public Belt R. R. Comm. v. Ward*, 195 F.2d 829, 833 (5th Cir. 1952), a railroad employee (Mrs. Ward), who was not even a member of the union that acted as her statutory representative (the

Brotherhood of Railway and Steamship Clerks), found that her name had been removed from the seniority list pursuant to the protest of the Brotherhood. She protested this act to the carrier to no avail and then conferred with the *local* representative of the Brotherhood who *refused* to represent her in connection with her grievance. She did not stop at this point, however, but sought further assistance from the Brotherhood and "finally was successful in obtaining the assistance of the *national* representatives of the Brotherhood consisting of the System Committee who prosecuted her claim for her before the National Railroad Adjustment Board." The point is that unless an attempt is made to bring the matter of improper representation to the attention of the responsible officials of a labor organization, it cannot be said that satisfactory resolution of the dispute is unavailable through internal corrective action.

Very recently, in *Clayton v. International Union of Marine and Shipbuilding Workers of America, etc.*, _____ U.S. ____, 36 LW 4491, 4493 (1968), the Court in commenting on the language of § 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 [73 Stat. 522, 29 U.S.C. § 411(a)(4)] which states that a union member "may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization before instituting legal or administrative proceedings * * *," observed:

> "We conclude that 'may be required' is not a grant of authority to unions more firmly to police their members but a statement of policy that the public tribunals whose aid is invoked may in their discretion stay their hands for four months, while the aggrieved

person seeks relief within the union. We read it, in other words, as installing in this labor field a regime *comparable to that which prevails in other areas of law* before the federal courts, which often stay their hands while a litigant seeks administrative relief before the appropriate agency." (Emphasis ours.)

The requirement of exhaustion of remedies is a matter within the sound discretion of the courts, and, as the Court pointed out in footnote 8 to its opinion in *Industrial Union of Marine and Shipbuilding Workers, etc., supra*, is not required when the remedies are inadequate. Nevertheless, the breach of the duty of fair representation issue raised in the instant case is one on which the parent or international labor organization, which is being sued herein, *should* have the first opportunity to take corrective action. The fidelity with which the Brotherhood's representatives in the field discharge their duties as collective bargaining agents is a matter of primary concern to the Brotherhood inasmuch as it may be legally responsible for improper acts on their part. The Brotherhood will be better enabled to furnish adequate representation within the letter and the spirit of the law if its members such as Petitioners are required at least to attempt to bring their claims of improper representation to the attention of responsible officers highly enough situated to put the organization on notice of the alleged misconduct of its agents. As Mr. Justice Harlan concurring in *Industrial Union of Marine and Shipbuilding Workers, etc., supra*, said (36 LW at 4494):

"Responsible union self-government demands, among other prerequisites, a fair opportunity to function."

A similar view was expressed in *Wirtz v. Local Union No. 125, Laborers Int'l. Union*, 389 U.S. 477, 19 L. ed. (adv.) 716, 722 (1968), where, in referring to the exhaustion of

remedies requirement in Section 402(a) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 534, 29 U.S.C. § 482 (a), the Court said:

> "It is true that *the exhaustion requirement was regarded by Congress as critical to the statute's objective of fostering union self-government.* By channeling members through the internal appellate processes, Congress hoped to accustom members to utilizing the remedies made available within their own organization; at the same time, however, unions were expected to provide responsible and responsive procedures for investigating and redressing members' election grievances. These intertwined objectives are not disserved but furthered by permitting the Secretary to include in his complaint at least any § 401 violation he has discovered which the union had *a fair opportunity to consider and redress* in connection with a member's initial complaint." (Emphasis ours.)

The decision of the trial court to require a reasonable attempt at utilization of remedies under the Brotherhood's constitution was a matter lying within its sound discretion. Indeed, the decision appears to be not merely desirable but virtually obligatory in light of this Court's recent Labor-Management Reporting and Disclosure Act pronouncements which intimate strongly that exhaustion of, or at least reasonable resort to, remedies provided under union constitutions as a condition precedent to suit in court is a favored concept under principles of federal labor law. A suit against a labor organization for breach of the duty of fair representation, as was pointed out earlier, is a suit based upon precepts of general federal labor law. *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Conley v. Gibson*, 355 U.S. 41 (1957); *Vaca v. Sipes, supra.*

The trial court did not err, therefore, in dismissing the amended complaint against the Brotherhood on the ground

that Petitioners failed to allege resort to remedies available under the Brotherhood's constitution which might have afforded Petitioners relief from the purported unfair representation, or to plead a sufficient justification or excuse for failing to do so.

II. The claim against the Railroad for breach of contract must be processed to the National Railroad Adjustment Board.

The other claims which were dismissed by the trial court sought monetary relief equivalent to back pay allegedly due Petitioners and a readjustment of their employment status in accordance with what they contend is required pursuant to the provisions of the applicable collective bargaining agreement. These are claims against the Railroad for breach of contract, and the relief sought is in the nature of a decree of specific performance of a contract for personal services.

Inasmuch as Petitioners are suing as current railroad employees seeking to enhance their employment status, it seems plain that their claims must be submitted before the appropriate division of the National Railroad Adjustment Board for final and binding determinations in accordance with Section 3 First (i) of the Railway Labor Act [48 Stat. 1185, 45 U.S.C. § 153 First (i)]. This Court has consistently so held since *Slocum v. Delaware L. & W. R. Co.*, 339 U.S. 239 (1950) and *Order of Ry. Conductors v. Southern Ry.*, 339 U.S. 255 (1950).

The only exception to this rule is under the doctrine of *Moore v. Illinois Central Railroad Co.*, 312 U.S. 630 (1941) where "a discharged railroad employee aggrieved by his discharge may either (1) pursue his remedy under the administrative procedures established by an applicable collective bargaining agreement subject to the Railway

Labor Act, and his right of review before the National Railroad Adjustment Board, or (2) if he accepts his discharge as final, bring an action at law in an appropriate state court for money damages if the state courts recognize such claims." *Walker v. Southern R. Co.*, 385 U.S. 196 (1966). In all other cases "the Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act." *Id.* at 198.

Petitioners contend that the Adjustment Board would not be a fair and impartial tribunal in their case because the members of the Second Division, before whom their claims would be heard, are selected and compensated in part by the railroad industry and the railway labor organizations which are national in scope. On this analysis, there would be built-in bias every time an individual employee, contrary to the wishes of his statutory representative, took a claim to the Adjustment Board. There is no merit to such argument. An award of a division of the Adjustment Board, moreover, can be set aside in the courts by an aggrieved employee or employees on the ground of "fraud or corruption by a member of the division making the order" pursuant to Section 3 First (q) of the Act [80 Stat. 208, 45 U.S.C. § 153 First (q)].

Petitioners also contend that an average time lapse of 5 years occurs before a matter is disposed of before the Adjustment Board. This, even if it were true, would not excuse railroad employees from resorting to such mandatory statutory procedure. However, it was noted in *Walker v. Southern R. Co., supra,* at 198, that the Section 3 of the Railway Labor Act was "drastically" revised in 1966 to correct some of the alleged abuses in Adjustment Board procedures, of which the time lag was one of the most notable. Since Petitioners are situated in the carmen's craft or class, their claims would be submitted before the

Second Division of the National Railroad Adjustment Board. Reference to the most recent volume of published awards of the Second Division (Volume 49, *Awards of the Second Division, National Railroad Adjustment Board,* Keenan Printing Company, Chicago, Illinois) reveals that in most instances the submissions were handled to a conclusion in less than three years. The cases reported in Volume 49, moreover, cover the period February 26, 1965, to July 10, 1965, and, thus, do not reflect the significant 1966 revisions in Adjustment Board procedures commented upon in *Walker, supra.*

In certain respects, Petitioners are attempting to utilize the racial issue as a justification to avoid their obligations as railroad employees to comply with the statutory procedure prescribed by the Railway Labor Act. *Pennsylvania R. Co. v. Day,* 360 U.S. 548, 551-552 (1959) provides an illuminating analogy on this point. In *Day,* a retired railroad employee sought to sue in court on a claim against a carrier for substantial back pay allegedly due as a result of improper work assignments. His claim was initiated while he was an active employee, and was processed initially "on the property" up to the carrier's chief operating officer in the region where he was employed. It was denied at that level, whereupon the employee retired from active service. He thereafter instituted civil suit against the carrier for breach of contract, and contended that inasmuch as at the time suit was filed he was a retiree rather than an active employee, the strictures of *Slocum, supra,* and *Order of R. Conductors v. Southern R. Co., supra,* were not applicable. He argued that, as a retiree, his right to sue in the courts for vindication of his contract claim was analogous to the right of a discharged employee to sue in court under the *Moore* doctrine. This Court disagreed and said (*Id.* at 552):

> "* * * All the considerations of legislative meaning and policy which have compelled the conclusion that *an active employee must submit his claims to the Board,* and may not resort to the courts in the first instance, *are the same when the employee has retired* and seeks compensation for work performed while he remained on active service. *A contrary conclusion would create a not insubstantial class of preferred claimants.* Retired employees would be allowed to bypass the Board specially constituted for hearing railroad disputes whenever they deemed it advantageous to do so, whereas all other employees would be required to present their claims to the Board. This case forcefully illustrates the difficulties of such a construction." (Emphasis ours.)

The language quoted above seems equally pertinent to the Petitioners' theory herein. Neither retirees nor Negro employees are placed in a specially preferred category *under the Railway Labor Act.* Petitioners proceeding on their fallacious premise of racial exceptions from general rules argue in the Petition herein, at pages 18 and 19, that *Republic Steel Corp. v. Maddox, supra,* which explicated the prevailing rule requiring exhaustion of remedies under collective bargaining agreements, would have been decided differently if racial discrimination had been an issue in that case. We urge the Court to make it clear in its opinion in this case that there is no preferred status in litigation based on race and to emphasize that the Railway Labor Act is uniform in its applicability to railroad employees as a whole.[1]

---

[1] The issue of the rights and remedies available to Petitioners or some of them, under the provisions of Title VII of the Civil Rights Act, 78 Stat. 253, 42 U.S.C. § 2000 (e), is not involved here. As the district court noted in its Memorandum Opinion, one of the plaintiffs in the instant case, James C. Dent, also brought suit in the style of a class action against the same defendants under the provisions of Title VII (A. 15).

CONCLUSION.

The decision of the courts below is predicated solely on failure to exhaust remedies.

The allegations of the amended complaint are quite broad in scope, partly because they are so loosely drawn. Nevertheless, they reveal that no attempt was made to process the claim against the Brotherhood for breach of the duty of fair representation under the Brotherhood's constitution. The Brotherhood, in short, was never given an opportunity based upon effective notice to responsible officers to correct the alleged abusive conduct on the part of its field representatives. A genuine attempt to obtain relief within the union's own tribunals against conduct of this character may and should be required as a condition precedent to seeking relief in the courts, and it manifestly was not an abuse of discretion on the part of the court to dismiss the complaint against the Brotherhood when such an attempt was not sufficiently alleged.

The lower courts' decisions are also correct in respect to Petitioners' claims against the Railroad. They are current, rather than discharged, employees of the Railroad, and their claims for promotions and back pay are within the exclusive jurisdiction of the National Railroad Adjustment Board.

For these reasons, we submit that the decision of the Court of Appeals below should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. 38

JAMES G. GLOVER, et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF
OF RESPONDENT ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 1193.

JAMES G. GLOVER, et al.,
Petitioners,

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ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF
OF RESPONDENT ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY.

STATEMENT OF THE CASE.

This is another case where railroad employees have asserted claims based upon their collective bargaining agreement but have at the same time sought to by-pass both the grievance procedure of the agreement and the National Railroad Adjustment Board.[1]

[1] See Railway Labor Act, Sec. 3, First, 45 U. S. C., § 153, First.

The petitioners are employees of the Frisco Railroad, work in the job classification of Carmen Helpers, and are represented by the Brotherhood of Railway Carmen. Alleging in their complaint that their wages, working conditions, and employment rights are covered by the collective bargaining agreement in effect between the Frisco and the Brotherhood, they asserted that apprentices are being assigned to certain work "instead of calling out [petitioners] to do said work as required by the Collective Bargaining Agreement as properly and customarily interpreted" and that the denial of the work to them "has been contrary to previous custom and practice by [respondents] in regard to seniority" (A. 7).

Following submission of the case on briefs and oral argument, the district court dismissed the action on the ground that the allegations of the complaint affirmatively showed that the petitioners had not availed themselves of their contractual and administrative remedies and that the conclusionary averment that such remedies were inadequate was insufficient ground to give the court jurisdiction over the dispute (A. 14-15). Petitioners thereafter requested leave to amend to attempt to cure "certain" of the deficiencies pointed out by the Court (A. 16-17), and this request was granted (A. 18). The amendment emphasized, however, their recognition of the existence of their contractual and administrative remedies while alleging no facts showing that petitioners had pursued them (A. 18-20). The district court accordingly held that the amendment "does not cure the defects pointed out in the memorandum opinion of this Court" and dismissed the action (A. 24). The Fifth Circuit, Judges Rives, Goldberg and Dyer, affirmed (A. 28).

We submit that the decisions below are entirely sound and correct applications of the governing legal principles and should be affirmed by this Court.

ARGUMENT.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PROVIDES THE REMEDY WHICH THE PETITIONERS SEEK THROUGH THIS PETITION.

Petitioners' claim of racial discrimination against the Frisco is based wholly and solely on the Frisco's collective bargaining agreement with the Brotherhood. The decision of the district court dismissing the complaint as to the railroad was based and affirmed on two separate and independent grounds: (1) the Railroad Adjustment Board's exclusive jurisdiction over the contractual claim and (2) petitioners' failure to use remedies available to them under the bargaining agreement. As will hereafter appear, the decisions below are supported on both grounds by abundant statutory and case authority.

Petitioners argue, however, that their claim of racial discrimination requires a departure from this authority. In this regard the district court which dismissed the complaint is wholly in agreement with petitioners where suit is brought under Title VII of the Civil Rights Act of 1964, 42 U. S. C., § 2000e et seq., and so held in a case involving one of the petitioners. *Dent v. St. Louis-San Francisco R. Co.*, 265 F. Supp. 56 (N. D. Ala. 1967). This case, as the district court noted in the decision below, involved a complaint alleging racial discrimination by the Frisco filed on behalf of the same class of employees as is involved in this case and seeking identical relief. The district court held that neither recourse to the Adjustment Board nor exhaustion of contractual grievance procedures were prerequisites to the court's jurisdiction in a Title VII action:

> One of the questions before the court concerns the necessity of the plaintiff first pursuing remedies

> available under the collective bargaining agreement or before the National Railroad Adjustment Board. The court agrees with the position, taken by the plaintiff and the Commission, that the principle of *Republic Steel Corp. v. Maddox* should not be applied to actions brought under Title VII of the Act and therefore holds that remedies under the collective bargaining agreement or before the Adjustment Board need not be pursued prior to the institution of an action under this title.
>
> 265 F. Supp., pp. 57-58.

Title VII of the Civil Rights Act of 1964 and specifically the district court's position in the *Dent* case provide both a body of substantive law and remedies in the federal courts to protect petitioners against the wrongs alleged in the complaint. If there was once a need for this Court to contrive an unprecedented remedy in the courts for railroad employees alleging racial discrimination under a bargaining agreement against their employer, Congress eliminated this need in Title VII as construed by the district court. Accordingly on the basis of the authority to be discussed, the decision below should be affirmed.[2]

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[2] With respect to the *Dent* complaint, petitioners may argue that the district court nevertheless dismissed it. This is true. On March 10, 1967, the court on the basis of a lengthy opinion dismissed the complaint on the ground that the Equal Employment Opportunity Commission had not attempted conciliation of Mr. Dent's grievance with the company, 265 F. Supp. 56 (N. D. Ala. 1967). Had Mr. Dent at the time of dismissal urged the Commission to conciliate his grievance and had conciliation been unsuccessful, the claim asserted in this suit could be well along its way toward trial in the district court.

II. THE NATIONAL RAILROAD ADJUSTMENT BOARD HAS EXCLUSIVE JURISDICTION OVER THE CLAIM MADE BY PETITIONERS IN THIS SUIT.

A. The Decisions of This Court.

This Court has repeatedly for almost two decades held that Congress conferred exclusive jurisdiction in the National Railroad Adjustment Board to adjust contractual disputes between active railroad employees and their employers.[3] The leading case, *Slocum v. Delaware and L. & W. R. Co.*, 339 U. S. 239 (1950), involved a dispute between two unions over the scope of their agreements with the railroad. In concluding that the Board had exclusive jurisdiction to adjust this dispute the Court emphasized three central facts in that case: (1) the dispute concerned an "interpretation of an existing bargaining agreement," (2) settlement of the dispute would "govern the future relations of those parties," (3) the type of grievance was considered "a potent cause of friction." 339 U. S. at 242.

On the basis of these facts, the Court held:

> The [Railway Labor] Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad

[3] The sole exception to this rule, which is expressed in *Moore v. Illinois Central Railroad Co.*, 312 U. S. 630 (1941) and *Walker v. Southern Railway Co.*, 385 U. S. 196 (1966), is that a discharged employee accepting his discharge as final may sue for money damages in the courts. As the claim here involves current railroad employees and the future relationship between these employees and their employer, it obviously does not fall under the rule of *Moore* and *Walker*.

> jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems.
>
> * * * * * * * * *
>
> We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive.
>
> 339 U. S. at 243-244.

The theme of *Slocum* that Congress intended the Board to have exclusive jurisdiction over disputes growing from railroad bargaining agreements has been repeated often by this Court since *Slocum*. The key notes of this theme are: (1) the Board is peculiarly well suited to solve contractual disputes arising in the railroad labor world and (2) exclusive jurisdiction in the Board over contractual disputes will provide desirable uniformity.[4]

In *Brotherhood of R. T. v. Chicago R. & I. R. Co.*, 353 U. S. 30 (1957), this Court, after an extensive discussion of legislative history, said:

> "This record is convincing that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field. Our reading of the Act is therefore confirmed, not rebutted, by the legislative history."
>
> 353 U. S. at 39.

Pennsylvania R. R. Co. v. Day, 360 U. S. 548 (1959), concerned whether a retired railroad employee could by-

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[4] See *Order of R. Conductors v. Southern R. Co.*, 339 U. S. 255 (1949), decided on the same day as *Slocum*.

pass the Board and take a railroad bargaining agreement dispute directly to court. The Court held no:

> Since the Board has jurisdiction it must have exclusive primary jurisdiction. All the considerations of legislative meaning and policy which have compelled the conclusion that an active employee must submit his claims to the Board, and may not resort to the courts in the first instance, are the same when the employee has retired and seeks compensation for work performed while he remained on active service.
>
> 360 U. S. at 552.

Though a majority of six justices joined the *Day* opinion, the dissenters expressed no doubt whatever that the Adjustment Board had exclusive jurisdiction over bargaining agreement disputes of active employees:

> It is clear, however, that active employees work together from day to day; their work frequently makes them live together in the same neighborhood; they, in fact, constitute almost a separate family of people, discussing their interests and affairs, and airing among themselves their complaints and grievances against the company. In such an atmosphere individual dissatisfactions tend to become those of the group, breeding industrial disturbances and strikes.
>
> 360 U. S. at 557.

Several years later in *Locomotive Engineers v. Louisville & Nashville R. Co.*, 373 U. S. 33 (1963), the Court once again stated that exclusive jurisdiction to settle contract disputes in the railroad world lay in the Adjustment Board:

> The several decisions of this Court interpreting § 3 First have made it clear that this statutory grievance procedure is a mandatory, exclusive, and comprehensive system for resolving grievance disputes.

> . . . Similarly, an employee is barred from choosing another forum in which to litigate claims arising under the collective agreement. . . . [T]he remedies provided for in § 3 First were intended by Congress to be the complete and final means for settling minor disputes.
>
> 373 U. S. at 38, 39.

Finally, in *Gunther v. San Diego and Arizona E. R. Co.*, 382 U. S. 257 (1965), a unanimous Court re-emphasized that the Adjustment Board was peculiarly qualified to adjudicate claims of railroad employees growing from their bargaining agreement and that jurisdiction to adjudicate these claims had been vested by Congress solely and exclusively in the Board:

> The Railway Adjustment Board, composed equally of representatives of management and labor is peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world. Its membership is in daily contact with workers and employers, and knows the industry's language, customs, and practices.
>
> • • • • • • • •
>
> Also in Locomotive Engineers v. Louisville & Nashville R. Co., 373 U. S. 33, Court said that prior decisions of this Court made it clear that the Adjustment Board provisions were to be considered as "compulsory arbitration in this limited field," p. 40, "the complete and final means for setting minor disputes," p. 39, and "a mandatory, exclusive, and comprehensive system for resolving grievance disputes," p. 38.
>
> 382 U. S. at 261, 263-264.

Unless this Court is suddenly to disregard the intent of Congress and the reasoning of the line of cases from *Slocum* to *Gunther*, the conclusion in this case is abso-

lutely inescapable. The Adjustment Board has exclusive jurisdiction over the contractual dispute between the petitioners and the Company.[5] All of the fourteen petitioners are current employees. Their dispute vitally concerns the promotional rights of an untold larger number of employees whom they seek to represent in a class action. Their claim on its face calls not for a simple common law interpretation of an existing bargaining agreement but for an understanding of "custom and practice" in the railroad world. And as much as any railroad dispute reviewed by this Court in the above decisions, the dispute here is likely to cause friction leading to a possible strike. A case, therefore, could not be more closely tailored to fit within the exclusive jurisdiction of the Adjustment Board as described by this Court in its many recent decisions.

B. The Decisions of the Lower Federal Courts.

The Circuit Courts and the District Courts have held uniformly under the *Slocum* line of cases that the Adjustment Board has exclusive jurisdiction to hear contractual claims of the type asserted here. The Eighth Circuit in *Howard v. St. Louis-San Francisco Railway Co.*, 361 F. 2d 905 (8th Cir. 1966, cert. den., 385 U. S. 986 (1967)), stated in a case involving race discrimination charges substantially identical to the ones made here:

> Beyond doubt the Paragraph 15 complaints are "minor" disputes within the meaning of the Act.

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[5] It is well settled that an employee may take a grievance to the Board without the aid of his bargaining representative. *E. g. Thompson v. New York Central R. Co.*, 361 F. 2d 137 (2d Cir. 1966):

> There is no doubt that individual employees, such as the plaintiffs here, who interests vis-a-vis their employer are hostile to those of their union, have standing to present grievances to the Adjustment Board, irrespective of the union's position.
>
> 361 F. 2d at 143.

> This being so the train porters were required, as a prerequisite to relief in the federal courts, to pursue their remedies in accordance with the procedures embodied in their labor agreement, and the provisions of the Railway Labor Act. . . . None of the train porters ever progressed a timely claim to the Adjustment Board, or pursued any contractual or statutory remedies. Having failed to exhaust their contractual and administrative remedies, appellant is precluded from resorting to the federal courts for resolution of the Paragraph 15 grievances.
>
> 361 F. 2d at 912.

In *Thompson v. New York Cent. R. Co.*, 361 F. 2d 137 (2d Cir. 1966), the Second Circuit held in a similar case:

> [I]t is perfectly clear that the question of discrimination *vel non* depends upon the interpretation to be given to the 1964 agreement, as implemented by the August 18, 1965 agreement, and that this question of interpretation must be made by the Adjustment Board and not by the courts.
>
> 361 F. 2d 143.

Prior to rendering the decision below the Fifth Circuit in 1960 and 1964 had explained:

> "The Supreme Court has held beginning with Slocum . . . that, in an action by a railroad employee against his employer seeking an interpretation or ascertainment of rights under the contract of employment, when the vindication of such claimed right requires the interpretation or construction of the terms of the contract, the Adjustment Board established by the Railway Labor Act has exclusive jurisdiction." *Fingar v. Seaboard Air Line R. Co.*, 277 F. 2d 698, 700 (5th Cir. 1960).

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> "It is plain here that the dispute raised by the complaint could be resolved only by construing the existing contract. It follows that the trial court erred in entertaining jurisdiction of the suit. The appellee should have been remanded to the grievance procedures set forth in the contract." *St. Louis, San Francisco & Texas R. Co. v. Railroad Yardmasters of America*, 328 F. 2d 749, 753-754 (5th Cir. 1964), *cert. denied*, 377 U. S. 980 (1964).

For similar holdings in the district courts see, *e. g.*, *Nunn v. Missouri Pacific R. Co.*, 248 F. Supp. 304 (E. D. Mo. 1965) and *Wade v. Southern Pacific Co.*, 243 F. Supp. 307, (S. D. Tex. 1965).

There is thus a firm and uniform bedrock of cases decided at all levels of the federal court system to support the decisions below that the Adjustment Board has exclusive jurisdiction over petitioners' claim. We turn now to the several arguments of petitioners that these cases are not applicable here.

C. The Fair Representation Cases Do Not Create an Exception to the Exclusive Jurisdiction Rule.

Petitioners nevertheless argue, despite the line of cases from *Slocum* to *Gunther*, that the Adjustment Board does not have exclusive jurisdiction over this dispute. To support their position, petitioners first point to the fair representation cases commencing with *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192 (1944).[6]

These cases, petitioners contend, create an exception to the rule that disputes between employees and employers

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[6] For other cases in this line see *Tunstall v. Brotherhood of Locomotive Firemen and Engine Men*, 323 U. S. 210 (1944); *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768 (1952); *Graham v. Brotherhood of Railroad Firemen*, 338 U. S. 232 (1949); *Conley v. Gibson*, 355 U. S. 41 (1957).

requiring the interpretation and application of a railroad bargaining agreement must be submitted to the Board. The shortcoming of this contention which is both obvious and fatal is that the *Steele* line of cases concerns neither disputes between employees and employers nor disputes calling for the interpretation or application of collective bargaining agreements. This line of cases involves instead disputes between unions and employees arising almost completely apart from the bargaining agreement. Chief Justice Stone defined the scope of these cases in the opening sentence of the Court's opinion in *Steele*:

> "The question is whether the Railway Labor Act . . . . imposes on a labor organization . . . the duty to represent all the employees in the craft without discrimination because of their race . . ."
>
> 323 U. S. at 193-194.

The Court went on to say in *Steele* that it found no "differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board." *Id.* at 205.

Likewise in *Brotherhood v. Howard*, 343 U. S. 768 (1952), when the same issue was raised between railroad employees and their union, this Court repeated that "the claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in Slocum . . . This dispute involves the validity of the contract, not its meaning." *Id.* at 774. Finally in *Conley v. Gibson*, 355 U. S. 41 (1957), relied on heavily for petitioners, a unanimous Court stated:

> "This case involves no dispute between employee and employer but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining. . . . Furthermore, the contract be-

tween the Brotherhood and the Railroad will be, at most, only incidentally involved in resolving this controversy between petitioners and their bargaining agent."

Id. at 44-45.

Therefore, petitioners' argument that the fair representation line of cases supports their contention that a district court has jurisdiction to adjust their claim against their employer based solely on the bargaining agreement ignores entirely the parties, the issues, and the holdings on the fair representation cases.

D. Petitioners' "Four Points" Based on "Public Policy" Do Not Support Departure From the Exclusive Jurisdiction Rule.

1. These "points" should be argued to Congress and not to this Court.

Petitioners next raise four "points" based on "public policy" which, they suggest, give good reason for stripping the Adjustment Board of its exclusive jurisdiction in this case. It is hard to see how these policy considerations are properly addressed to this Court after almost twenty years of uninterrupted pronouncements that Congress rather than the Court gave the Board exclusive jurisdiction to hear contractual disputes between current railroad employees and their employer. Congress, which amended the Railway Labor Act in 1966, was at that time very definitely aware of this Court's decisions from *Slocum* to *Gunther*.[7] The House report on the 1966 amend-

[7] Oral and written statements made at hearings on the 1966 amendments both in the House and the Senate are replete with discussions of the *Slocum* line cases. See, *e.g.*, oral statement of Mr. Crotty, Hearings before the House Subcommittee on Transportation and Aeronautics on H. R. 701, H. R. 704, H. R. 706, 89th Cong., 1st Sess., pp. 11-22; Written statement of Mr. Schoene, Hearings before the Senate Subcommittee on Labor, H. R. 706, 89th Cong., 2d Sess., pp. 9-19.

ments referred specifically to *Union Pacific v. Price*, 360 U. S. 602 (1959), *Pennsylvania R. v. Day*, *supra*, and *Brotherhood of R. Trainmen v. Chicago & Illinois R.*, *supra*, and stated, "(w)hen read in conjunction with other Supreme Court decisions, these decisions make this compulsory arbitration system the exclusive means by which employees may obtain decisions on minor grievances."[8] Likewise in the Senate, Senator Morse, Chairman of the Labor Subcommittee, ordered the *Gunther* decision appended to the report of the Senate hearings[9] and in the hearings quoted from it at length.[10] If Congress thought that the rule of exclusive jurisdiction as expressed in *Slocum* and the cases following it was contrary to good public policy, it could have amended the rule. But instead, quite obviously aware of the rule, Congress left it wholly in tact.

2. **The "points" fail on their own lack of merit.**

Even though legislative inaction in 1966 must be taken as congressional approval of the exclusive jurisdiction rule, respondent will meet each of petitioners' four "points" on its merits to show that rather than supporting departure from the exclusive jurisdiction doctrine these points instead illustrate the doctrine's solid validity as applied to this case.

Petitioners' "Point No. 1". Petitioners state that the Adjustment Board should not have exclusive jurisdiction in this case because it lacks the power to redress alleged discrimination by the Union. If one should ask why this lack of power should deprive the Board of exclusive jurisdiction, the answer will not be found in petitioners' brief.

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[8] H. R. Rep. No. 1114, 89th Cong., 1st Sess. (1965), p. 15.

[9] Hearings before the Senate Subcommittee on Labor on H. R. 705, 89th Cong., 1st Sess., p. 43.

[10] *Id.* at 47.

The best guess at what petitioners are driving at is that the Adjustment Board cannot fashion an adequate remedy in this case. As an answer to this proposition it is sufficient to say that the Board has the power to entitle petitioners to promotion to carmen and back pay. Nowhere have petitioners asked for more.

Petitioners' "Point No. 2". Petitioners' next point is that the Board is "stacked" against them and therefore would be unable to render an impartial decision in this case. An initial answer to this contention is that it has been rejected repeatedly by federal and state courts throughout the country. See *Alabaugh v. Baltimore & Ohio R. Co.*, 222 F. 2d 861, 867 (4th Cir. 1955), *cert. denied*, 350 U. S. 839 (1955), *Johns v. Baltimore & Ohio R. Co.*, 118 F. Supp. 317, 322 (N. D. Ill. 1954), *aff'd per curiam*, 347 U. S. 964 (1954), *United Railroad Operating Crafts v. Pennsylvania R. Co.*, 212 F. 2d 938, 942 (7th Cir. 1954), *Cook v. Brotherhood of Sleeping Car Porters*, 309 S. W. 2d 579, 589-590 (Mo. 1958), *cert. denied*, 358 U. S. 817 (1958). Furthermore it is completely without merit as a matter of policy.

First, the Company assumes that petitioners are not stating in "Point No. 2" that the Board might abet, in violation of the United States Constitution, any racially discriminatory action alleged in the complaint.[11] Presumably, instead, what the petitioners are contending is that in this case and any other case where a group of active railroad employees allege that they are disadvantaged by operation of an agreement between the employer and the union, the Board, "representing" the employer and the union is likely not to be an impartial tribunal to settle the dispute. Therefore, according to

[11] If this is petitioners' contention, their premise is wholly without factual foundation and even if the Board were to violate the equal protection guarantees of the Constitution the federal courts would clearly have jurisdiction to redress the violation.

petitioners, Congress intended that the courts be given jurisdiction over such contractual claims.

There could hardly be an argument more calculated to create lack of uniformity in the interpretation of railroad labor contracts than this one. Railroad employees are, relative to one another, advantaged and disadvantaged daily by joint decisions of management and union. As this Court said unanimously in *Ford Motor Company v. Huffman*, 345 U. S. 330 (1953), in the labor world, "the complete satisfaction of all who are represented is hardly to be expected." *Id.* at 338. Certainly Congress, which, as this Court has repeatedly emphasized, established exclusive jurisdiction in the Board and thereby promoted uniformity in the interpretation and application of railroad bargaining agreements, did not intend that every group of dissatisfied railroad employees should have access to the federal courts as soon as a shop steward advised them against filing a complaint with the union. Yet petitioners' "Point No. 2" has no other conceivable meaning.

Petitioners' "Point No. 3". The third "point" is that limited review on appeal from a decision of the Board is a denial of the due process clause of the Fifth Amendment.[12] This argument, if accepted, would require at the very least the overruling of the entire *Slocum* to *Gunther* line of cases and ultimately would result in the demise of the entire structure of labor arbitration law. Hopefully, this Court will not find this course of action advisable.

Petitioners' "Point No. 4". Petitioners' final "point" to support a departure from the exclusive jurisdiction rule rests on what petitioners call "a new body of public pol-

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[12] The inequality in appeal from the Adjustment Board noted by this Court in *Walker v. Southern R. Co., supra*, has been eliminated by the 1966 amendments to the Railway Labor Act. See illustration of amendments contained in S. Rep. No. 1201, 89th Cong., 1st Sess. (1966), at p. 11.

icy'' manifesting itself in the Labor Management Reporting and Disclosure Act and in the Civil Rights Act of 1964. This ''point'' only emphasizes the many channels to relief available to petitioners to redress alleged unlawful discrimination. As stated in Part I above, most damaging to petitioners' argument is the presence of Title VII of the Civil Rights Act. The remedies under Title VII were available to petitioners when this suit was filed and are now. This remedy being available, it is hardly in the interest of ''public policy'' to disregard the policy behind the exclusive jurisdiction rule in order to give petitioners an alternative, contrived and unprecedented entry to the federal courts.

E. Petitioners' Contention That Five Years May Be Required to Adjudicate Their Claim Before the Adjustment Board is Wholly Erroneous.

Generously sprinkled throughout petitioners' brief in the Fifth Circuit and the petition here (incorporated in large part in the brief) are various assertions that a delay of some five years will attend adjudication of petitioners' claim before the Adjustment Board. In going outside the record to make these assertions petitioners display a remarkable ignorance of the real facts. Shortly before the complaint was filed, Representative Williams testified before the House Subcommittee on Transportation and Aeronautics that '''At the current rate of productivity . . . it would take a little over a year to dispose of all the cases on the docket of the Second Division''[13] of the Board which has jurisdiction over petitioners' grievance.[14]

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[13] Hearings before House Subcommittee on Transportation and Aeronautics, *supra*, p. 4.

[14] The Railway Labor Act, Sec. 3, First (h), provides:

"The said Adjustment Board shall be composed of four divisions . . . and the said divisions as well as the number of their members shall be as follows:

Second division: To have jurisdiction over disputes involving . . . car men. . . ."

Senator Morse in the committee report authored by him on the 1966 amendments stated, "The Board procedure for handling disputes has worked expeditiously in the Second and Fourth Divisions. . . . The Second Division which handles an average of 247 cases a year, has a backlog of little over one year's work."[15] The House report, prepared by Representative Staggers, contains a substantially identical statement.[16] It is therefore impossible for petitioners to conclude honestly that any burdensome period of time will be required for the adjudication of their claim. As a matter of fact, had petitioners resorted to the Adjustment Board, their claim would have already been adjudicated and not be in this Court on a procedural point.

F. Summary.

Petitioners' argument that the Adjustment Board does not have exclusive jurisdiction to hear their claim against the Frisco based solely on their bargaining agreement fails utterly at every thrust. It is defeated first and conclusively by the *Slocum* to *Gunther* line of cases ratified in 1966 by the Congress. Petitioners' detouring contention that the fair representation cases create an exception to the exclusive jurisdiction rule ignores not only the facts and reasoning of the *Slocum* and *Gunther* cases but also that of the fair representation cases. Finally, the four-pronged policy attack is not only out of place in 1968 but turns against petitioners point by point.

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[15] S. Rep. No. 1201, 89th Cong., 2d Sess., p. 2.

[16] H. R. Rep. No. 1114, 89th Cong., 1st Sess., p. 4:

"The machinery established in the law can work expeditiously. For example, . . . (t)he Second Division, which handles an average of 247 cases a year, has a backlog of little over 1 year's work."

III. THE COURTS BELOW CORRECTLY HELD THAT PETITIONERS' FAILURE TO USE CONTRACTUAL GRIEVANCE PROCEDURES FORECLOSED JURISDICTION OVER THEIR CLAIM IN THE FEDERAL COURTS.

This Court recently held in *Republic Steel Corp. v. Maddox*, 379 U. S. 650 (1965):

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must **attempt** use of the contract grievance procedure agreed upon by employer and union as the mode of redress. . . . And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so."
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> 379 U. S., pp. 652-653 (emphasis in text).

Shortly afterward in *Vaca v. Sipes*, 386 U. S. 171 (1967), this Court stated that the *Maddox* rule was settled:

> "Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. *Republic Steel Corp. v. Maddox* . . ."
>
> 386 U. S., pp. 184-185.

According to clear acknowledgments in the complaint as amended petitioners had two separate grievance procedures available to them which they did not use. First, petitioners could have filed with the union their grievance

for the union to process for them. Second, petitioners by themselves could have presented their grievance directly to the company. The allegations in the complaint make it abundantly clear that petitioners did not attempt to file a formal grievance under either procedure. As an excuse for their inaction, petitioners allege merely that the hostile attitudes of certain "representatives" of the union and the company discouraged them and made them feel that pursuit of the grievance under the contract procedures would be "useless." There is no allegation that these "representatives" would have had any role whatever in making decisions regarding petitioners' claim had they attempted to file it under either procedure. On these facts and admissions appearing on the face of the complaint it is impossible for petitioners to contend that they attempted use of the contractual grievance procedures as required by *Maddox* and *Vaca* as a prerequisite to court suit. Nor do they.

Instead petitioners argue that as railroad employees under *Walker v. Southern R. Co.*, 385 U. S. 196 (1966) they "are outside the purview" of *Maddox*. (Brief p. 10.) This contention is untenable. First, the holding of *Walker* is extremely narrow, limited to the facts of that particular case. Second, the facts emphasized in that case were that Walker was suing for wrongful discharge, that the appeal opportunities from the Adjustment Board were unequal, and that the First Division of the Board to whom Walker, a fireman, was required to go was seven and one-half years behind in its work. These facts for reasons stated above are not present in this case.[17]

The weakness of petitioners' argument that the rule of *Maddox* and *Vaca* does not apply to this case is made even more apparent by both the provisions of the Railway Labor Act and the particular facts of this case. First,

[17] See note 12 and text accompanying notes 13-16 above.

the Railway Labor Act unlike the National Labor Relations Act construed in *Maddox* and *Vaca* expressly provides in absolute terms that "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements . . . shall be handled in the usual manner up to and including the chief operating officer of the carriers designated to handle such disputes. . . ."[18] It is impossible to find in this mandate or any policy behind the Act any reason whatever for not applying the rule of *Maddox* and *Vaca* to this and other railroad cases. In fact, failure to do so would only mean an increase in the number of meritless claims filed before the Adjustment Board thereby impeding the Congressional purpose of the 1966 amendments to expedite adjudication before the Board.[19]

Second, in the words of Mr. Justice Black, dissenting in *Maddox*, that case did not involve a dispute over "general working conditions", but rather "an ordinary, common, run-of-the-mill" dispute between an isolated employee and his former employer over wages. 379 U. S., pp. 664, 659. This case on the other hand pits an entire class of active employees against their employer in a dispute over their promotional rights and future employment relationship. It is this type of dispute, even more than the dispute in *Maddox*, which in the absence of the *Maddox* rule "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." 379 U. S. at 652, quoting *Teamsters Local v. Lucas Flour Co.*, 369 U. S. 95, 103.

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[18] Railway Labor Act, Sec. 3 First (i), 45 U. S. C. 153, First (i).

[19] See S. Rep. No. 1201, 89th Cong., 2d Sess., p. 2:

> "The committee believes that the merits of every claim should be carefully considered by both the carrier and the employee representative in an attempt to solve the dispute before submission to the Board."

Third, with respect to *Vaca,* the union here unlike that in *Vaca,* does not possess the "sole power under the contract to invoke the higher stages of the grievance procedure." 386 U. S. at p. 183. By petitioners' own admission in the complaint they could have presented their grievance directly to the company without the aid of the union and under clearly established law they had the power to present their case on their own initiative to the Adjustment Board. *E. g., Thompson v. New York Central R. Co.,* 361 F. 2d 137, 143 (2d Cir. 1966). Thus in this case it is hardly an adequate excuse to avoid the *Maddox* doctrine for petitioners to allege, as they do, that the union was likely to refuse to process their grievance had they formally submitted it to the union.

Fourth, the lower federal courts have consistently held, as the courts below, that the doctrine of *Maddox* and *Vaca* is applicable in railroad cases. In *Howard v. St. Louis-San Francisco R. Co.,* 361 F. 2d 905 (8th Cir. 1966), *cert. denied,* 385 U. S. 986 (1966), the Eighth Circuit in a racial discrimination case almost identical to this one relying on *Maddox,* stated: "Having failed to exhaust their contractual and administrative remedies appellant[s are] precluded from resorting to the federal courts for resolution of the grievances." *Id.* at p. 912. See also, *Pacilco v. Pennsylvania R. Co.,* 381 F. 2d 570 (2d Cir. 1967); *Belanger v. New York Central R. Co.,* 384 F. 2d 35 (6th Cir. 1967); *Wade v. Southern Pacific Co.,* 243 F. Supp. 307 (S. D. Tex. 1965).

For all these reasons the doctrine of *Maddox* and *Vaca* that employees, as a prerequisite to filing a lawsuit, must attempt to use the contract grievance procedure to settle a contractual dispute is fully applicable to this case. As the complaint manifests beyond doubt that petitioners made no attempt to invoke formally either procedure available to them, the decision below should be affirmed.

CONCLUSION.

For all of the foregoing reasons the action of the district court dismissing the complaint is wholly in accord with the provisions of the Railway Labor Act and the decisions of this Court. Accordingly, the decision below upholding the dismissal should be affirmed.

Respectfully submitted,

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Certificate of Service.

I hereby certify that copies of the foregoing Brief for Respondent St. Louis-San Francisco Railway Company has been served on counsel by mailing copies by U. S. mail, postage prepaid, to Hon. William M. Acker, Jr., 600 Title Building, Birmingham, Alabama and to Hon. Jerome A. Cooper, Cooper, Mitch & Crawford, Suite 1025 Bank for Savings Building, Birmingham, Alabama.

This the 3rd day of July, 1968.

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Of Counsel.

SUPREME COURT OF THE UNITED STATES

No. 38.—October Term, 1968.

James G. Glover et al., Petitioners, v. St. Louis-San Francisco Railway Co. et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January 14, 1969.]

Mr. Justice Black delivered the opinion of the Court.

The 13 petitioners here, eight Negroes and five white men, are all employees of the defendant railroad, whose duties are to repair and maintain passenger and freight cars in the railroad's yard at Birmingham, Alabama. They brought this action in the United States District Court against the railroad and Brotherhood of Railway Carmen of America, which is the duly selected bargaining agent for carmen employees. The complaint alleged that all of the plaintiffs were qualified by experience to do the work of carmen but that all had been classified as Carmen Helpers for many years and had not been promoted. The complaint went on to allege the following explanation for the railroad's refusal to promote them:

"In order to avoid calling out Negro plaintiffs to work as Carmen and to avoid promoting Negro plaintiffs to Carmen, in accordance with a tacit understanding between defendants and a subrosa agreement between the Frisco and certain officials of the Brotherhood, defendant Frisco has for a considerable period of time used so-called "apprentices" to do the work of Carmen instead of calling our plaintiffs to do said work as required by the Collective Bargaining Agreement as properly and customarily interpreted; and the Frisco has used this

means to avoid giving plaintiffs work at Carmen wage scale and permanent jobs in the classification of Carmen. This denial to plaintiffs of work as Carmen has been contrary to previous custom and practice by defendants in regard to seniority as far as 'Upgrade Carmen' are concerned. Defendant Frisco is not calling any of plaintiffs to work as Carmen in order to avoid having to promote any Negroes to Carmen."

The complaint also claimed that each plaintiff had lost in excess of $10,000 in wages as the result of being a victim of "an invidious racial discrimination," and prayed for individual damages, for an injuntion to cause the defendants to cease and desist from their discrimination against petitioners and their class and "for any further, or different relief as may be meet and proper . . . ." The defendants moved to dismiss the complaint on the ground, among others, that petitioners had not exhausted the administrative remedies provided for them by the grievance machinery in the collective bargaining agreement, in the constitution of the Brotherhood and before the National Railroad Adjustment Board. The District Court, in an unreported opinion, sustained the motion to dismiss, and the plaintiffs then filed the following amendment to their complaint:

"On many occasions the Negro plaintiffs through one or more of their number, have complained both to representatives of the Brotherhood and to representatives of the Company about the foregoing discrimination and violation of the Collective Bargaining Agreement. Said Negro plaintiffs have also called upon the Brotherhood to process a grievance on their behalf with the Company under the machinery provided by the Collective Bargaining Agreement. Although a representative of the Brotherhood once

indicated to the Negro plaintiffs that the Brotherhood would "investigate the situation," nothing concrete was ever done by the Brotherhood and no grievance was ever filed. Other representatives of the Brotherhood told the Negro plaintiffs time and time again: (a) that they were kidding themselves if they thought they could ever get white men's jobs; (b) that nothing would ever be done for them; and (c) that to file a formal complaint with the Brotherhood or with the Company would be a waste of their time. They were told the same things by local representatives of the Company. They were treated with condescension by both Brotherhood and Company, sometimes laughed at and sometimes "cussed," but never taken seriously. When the white plaintiffs brought their plight to the attention of the Brotherhood, they got substantially the same treatment which the Negro plaintiffs received, except that they were called "nigger lovers" and were told that they were just inviting trouble. Both defendants attempted to intimidate plaintiffs, Negro and white. Plaintiffs have been completely frustrated in their efforts to present their grievance either to the Brotherhood or to the Company. In addition, to employ the purported internal complaint machinery within the Brotherhood itself would only add to plaintiffs' frustration and, if ever possible to pursue it to a final conclusion it would take years. To process a grievance with the Company without the cooperation of the Brotherhood would be a useless formality. To take the grievance before the National Railroad Adjustment Board (a tribunal composed of paid representatives from the Companies and the Brotherhoods) would consume an average time of five years, and would be completely futile under the instant circumstances where the Com-

pany and the Brotherhood are working "hand-in-glove." All of these purported administrative remedies are wholly inadequate, and to require their complete exhaustion would simply add to plaintiffs' expense and frustration, would exhaust plaintiffs, and would amount to a denial of "due process of law," prohibited by the Constitution of the United States."

The District Court again sustained the motion to dismiss. The Court of Appeals affirmed the dismissal, agreeing with the opinion of the District Court and adding several authorities to those cited by the District Court, 386 F. 2d 452 (C. A. 5th Cir. 1967), and we granted certiorari, — U. S. — (1968). We think that none of the authorities cited in either opinion justify the dismissal and reverse and remand the case for trial in the District Court.

It is true, as the defendants here contend, that this Court has held that the Railroad Adjustment Board has exclusive jurisdiction, under § 3 First (i) of the Railway Labor Act, set out below,[1] to interpret the meaning of the terms of a collective bargaining agreement.[2] We have held, however, that § 3 First (i) by its own terms

[1] In full, § 3 First (i) reads:

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act [June 21, 1934], shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." 48 Stat. 1191, 45 U. S. C. § 153 First (i).

[2] See, *e. g.*, *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239,

applies only to "disputes between an employee or group of employees and a carrier or carriers." *Conley* v. *Gibson*, 355 U. S. 41, 44. In *Conley*, as in the present case, the suit was one brought by the employees against their own union, claiming breach of the duty of fair representation, and we held that the jurisdiction of the federal courts was clear. In the present case, of course, the plaintiffs sought relief not only against their union but also against the railroad, and it might at one time have been thought that the jurisdiction of the Railroad Adjustment Board remains exclusive in a fair representation case, to the extent that relief is sought against the railroad for alleged discriminatory performance of an agreement validly entered into and lawful in its terms. See, *e. g.*, *Hayes* v. *Union Pacific R. Co.*, 184 F. 2d 337 (C. A. 9th Cir. 1950), cert. denied, 340 U. S. 942 (1951). This view, however, was squarely rejected in the *Conley* case, where we said, "[F]or the reasons set forth in the text, we believe [*Hayes, supra*] was decided incorrectly." 355 U. S., at 44, n. 4. In this situation no meaningful distinction can be drawn between discriminatory action in negotiating the terms of an agreement and discriminatory enforcement of terms that are fair on their face. Moreover, although the employer is made a party to insure complete and meaningful relief, it still remains true that in essence the "dispute" is one between some employees on the one hand and the union and management together on the other, not one "between an employee or group of employees and a carrier or carriers." Finally, the Railroad Adjustment Board has no power to order the kind of relief necessary even with respect to the railroad alone, in order to end entirely abuses of the sort alleged here. The federal courts may therefore properly exercise jurisdiction over both the union and the railroad. See also *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944).

The defendants also argue that the complaint should be dismissed because of the plaintiffs' failure to exhaust their remedies under the collective bargaining agreement, the union constitution, and the Railway Labor Act. They rely particularly on *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965), and *Vaca* v. *Sipes*, 386 U. S. 171 (1967). The Court has made clear, however, that the exhaustion requirement is subject to a number of exceptions for the variety of situations in which doctrinaire application of the exhaustion rule would defeat the overall purpose of federal labor relations policy. Thus, in *Vaca* itself the Court stressed:

> "[I]t is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established in the bargaining agreement. *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650. However, because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures." 386 U. S., at 185.

The Court in *Vaca* went on to specify at least two situations in which suit could be brought by the employee despite his failure to exhaust fully his contractual remedies. The circumstances of the present case call into play another of the most obvious exceptions to the exhaustion requirement—the situation where the effort to proceed formally with contractual or administrative remedies would be wholly futile. In a line of cases beginning with *Steele* v. *Louisville & Nashville R. Co.*, *supra*, the Court has rejected the contention that employees alleging racial

discrimination should be required to submit their controversy to "a group which is in large part chosen by the [defendants] against whom their real complaint is made." 323 U. S., at 206. And the reasons which prompted the Court to hold as it did about the inadequacy of a remedy before the Adjustment Board apply with equal force to any remedy administered by the union, by the company, or both, to pass on claims by the very employees whose rights they have been charged with neglecting and betraying. Here the complaint alleges in the clearest possible terms that a formal effort to pursue contractual or administrative remedies would be absolutely futile. Under these circumstances, the *attempt* to exhaust contractual remedies, required under *Maddox*, is easily satisfied by plaintiff's repeated complaints to company and union officials, and no time-consuming formalities should be demanded of them. The allegations are that the bargaining representatives of the car employees have been acting in concert with the railroad employer to set up schemes and contrivances to bar Negroes from promotion wholly because of race. If that is true, insistence that plaintiffs exhaust the remedies administered by the union and the railroad would only serve to prolong the deprivation of rights to which these plaintiffs according to their allegations are justly and legally entitled.

The judgment is reversed and the case is remanded for trial.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 38.—October Term, 1968.

James G. Glover et al., Petitioners, v. St. Louis-San Francisco Railway Co. et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January 14, 1969.]

Mr. Justice Harlan, concurring.

I join in the Court's opinion with one addition and one reservation.

I believe that *Richardson* v. *Texas & N. O. R. Co.*, 242 F. 2d 230 (1957), decided by the Fifth Circuit some years before its decision in the present case, also supports today's holding that the federal courts may grant railroad employees ancillary relief against an employer who aids and abets their union in breaching its duty of fair representation. A contrary result would bifurcate, and needlessly proliferate, litigation.

I think it clear that footnote 4 of *Conley* v. *Gibson*, 355 U. S. 41, 44 (1957), did not—as some of the language in today's opinion, *ante*, at 5, might otherwise imply—address itself to the question now decided, which is one of first impression in this Court. *Conley* was a suit against the union *only*. A careful reading of *Hayes* v. *Union Pacific R. Co.*, 184 F. 2d 337 (1950); the District Court's opinion in *Conley*, 138 F. Supp. 60 (1955), which relied on *Hayes;* and this Court's opinion in *Conley*, makes it readily apparent that our disapproval of *Hayes* had nothing to do with the question of jurisdiction over an employer in a fair representation action.